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218	Chinna Maracayar v. Avva Nachial	..	(1926) M. W. N. 627.
219	Fatima Khanam v. Raza Ali Khan	...	3 O. W. N. 778; A. I. R. 1926 Oudh 610.
221	Abdul Kadir Marakayar & Co., *In re*	...	49 M. 725; A. I. R. 1926 Mad. 1051; 51 M. L. J. 650; 24 L. W. 661 **S. B.**
222	Ram Narain v. Goura	...	3 O. W. N. 985; A. I. R. 1927 Oudh 68.
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227	Azimaddy v. Emperor	...	44 C. L. J. 253: A. I. R. 1927 Cal.17; 28 Cr. L. J. 99; 54 C. 237.
232	Sheo Balak v. Emperor	...	3 O. W. N. 301 Sup.; 28 Cr. L. J. 104.
234	Badu Mir v. Emperor	...	44 C. L. J. 314; 31 C. W. N. 165; 28 Cr. L. J. 106; A. I. R. 1927 Cal. 213; 54 C. 279.
235	Ekadashi v. Emperor	..	28 Cr. L. J. 107; A. I. R. 1927 Oudh 85.
236	Basanta Kumar Gossain v. Emperor	...	44 C. L. J. 317; 28 Cr. L. J. 108.
238	Daulat Nai v. Emperor	...	3 O. W. N. 304 Sup.; 28 Cr. L. J. 110; A. I. R. 1927 Oudh 70.
240	Yaru v. Emperor	...	28 Cr. L. J. 112; A. I. R. 1927 Lah. 79.
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244	Meghraj Kanyalal v. Durga Sahai Buldeodas	...	44 C. L. J. 364; 54 C. 97; A. I. R. 1927 Cal. 291.
255	Mustafa Husain v. Saidul Nisan	..	3 O. W. N. 282 Sup.; A. I. R. 1927 Oudh 66.
258	Saroda Prosad Pakrasi v. Umasankar Sanyal	...	44 C. L. J. 385; A. I. R. 1927 Cal. 168.
265	Sobhuza II v. Miller	..	30 C. W. N. 961; A. I. R. 1926 P. C. 131 **P. C.**
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271	Bhabhuti v. Gur Dass	...	3 O. W. N. 968.
274	Arunachala Udayar v. Pachayammal	..	52 M. L. J. 94; 25 L. W. 214; A. I. R. 1927 Mad. 292.
277	Bhagwan Singh v. Chedilal	...	3 O. W. N. 296 Sup.
278	Krishna Iyer v. William C. Yuille & Co., Ltd.	...	*Madras High Court.

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284	Arunachalam Chetty v. David	...	24 L W. 730; 51 M. L. J. 671; A. I. R. 1927 Mad. 166; 50 M. 239.
288	Babu Ram v. Nathu Ram	...	A. I. R. 1927 Lah. 78.
289	Narayan Kalu Chambhar v. Bayaji Appa Sanawane		28 Bom. L. R. 1191; A. I. R. 1927 Bom. 17.
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292	Joti Bala Debi v. Sheo Ling Shami Jangam	..	A. I. R. 1927 All. 201.
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300	Khair-ud-din v. Tara Singh	...	7 Lah. 491; A. I. R. 1927 Lah. 20; 27 P. L. R. 812.
307	Bhanudas Narayanboa Gosavi v. Krishnabai Chintaman Deshpande	..	28 Bom. L. R. 1225; 50 B. 716; A. I. R. 1927 Bom. 11.
309	Co-operative Town Bank v. Ramon Chettyar	..	4 R. 426; 5 Bur. L. J. 181; A. I. R. 1927 Rang. 55.
310	Collector of Satara v. Mahadu Raghu Kadam	..	28 Bom. L. R. 1231; A. I. R. 1926 Bom. 582; 50 B, 844.
312	Ramanujachariar v. Sundarachariar	...	25 L. W. 127; A. I. R. 1927 Mad. 287.
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315	Rangoon Gymkhana Club, *In re*	...	4 R. 456; A. I. R. 1927 Rang. 37 **F. B.**
318	Bhola Ram-Harbans Lal v. Bhagat Ram	..	8 Lah. L. J. 539; A. I. R. 1927 Lah 24.
321	Varadarajalu Nayudu v. Kuppusami Nayudu	...	51 M. L. J. 602: 49 M. 926; A. I. R. 1927 Mad. 18; 28 Cr. L. J. 113.
322	Muzaffar v. Emperor	...	8 Lah. L. J. 410; 27 P. L. R. 632; 28 Cr. L. J. 114.
324	Natesa Mudaliar, *In re*	...	51 M. L. J. 704; (1927) M. W. N. 6; 28 Cr L. J. 116; A. I R. 1927 Mad. 156; 38 M. L. T. 166.
324	Abdul Ghani v. Emperor	..	8 Lah. L. J. 559; 28 Cr. L. J. 116; 28 P. L. R. 27; A. I. R. 1927 Lah. 51.
326	Golla Pullamma v. Sanjivi Reddi	...	24 L. W. 715; 28 Cr. L. J. 118; A. I. R. 1927 Mad. 172.
326	Arjan v. Emperor	..	9 Lah. L. J. 36; 28 Cr. L. J. 118; A. I. R. 1927 Lah. 74.
328	Chinnammal v. Konda Reddi	...	28 Cr. L. J. 120; 38 M. L. T. 135; A. I. R. 1927 Mad. 277.
328	Mani Ram v. Emperor	...	8 Lah. L. J. 566; 28 Cr. L. J. 120; 27 P. L. R. 823; A. I. R. 1927 Lah. 52; 8 Lah. 114.
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341	Sanwel v. Emperor	...	28 Cr. L. J. 133; A. I. R. 1927 Sind 113.
342	Raja Ram v. Emperor	...	3 O. W. N. 1001; 28 Cr. L. J. 131; A. I. R. 1927 Oudh 64.
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347	Maung Sein v. Emperor	..	4 R. 462; A. I. R. 1927 Rang. 43; 28 Cr. L. J. 139.
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349	Nga Pa v. Emperor	...	4 R. 455; 5 Bur. L. J. 186; 28 Cr. L. J. 141; A. I. R. 1927 Rang. 98.
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352	Emperor v. Ramanuj	...	3 O. W. N. 311 Sup.; 28 Cr. L. J. 144; A. I. R. 1927 Oudh 101.
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409	Banwari Lal v. Emperor	...	L. R. 7 A. 177 Cr.; 25 A. L. J. 38; A. I. R. 1927 All. 49; 28 Cr. L. J. 153; 49 A. 215.
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642	Faqir Mohammad v. Ramzan	...	A. I. R. 1927 Lah. 171.
643	Municipal Board, Lucknow v. Debi Das	...	3 O. W. N. 514; A. I. R. 1926 Oudh 388; 13 O. L. J. 553; 1 Luck 414.
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654	Khillu Ram v. Jai Chand	...	A. I. R. 1927 Lah. 123
655	Appasa Rowther v. Muhammad Rowther	..	(1927) M. W. N. 38; 25 L. W. 102; 38 M. L. T. 24; A. I. R. 1927 Mad. 435.

656	Ananthalwar v. Narayana Prasad	..	24 L. W. 836; A. I. R. 1927 Mad. 190.
658	Chozimatathingal Thareekutti Haji v. M. Isanau	..	A. I. R. 1927 Mad. 431.
659	Balwant v. Sheodas	...	9 N. L. J. 205; A. I. R. 1927 Nag. 64.
660	Raman Chettiar v. Tirugnanasambandam Pillai	..	51 M. L. J. 869; 25 L. W. 25; A. I. R. 1927 Mad. 233; 50 M. 217.
666	Hukam Chand v. Ganga Ram	...	A. I. R. 1927 Lah. 111.
668	Neelakantamier v. Chinnammal	...	52 M. L. J. 13; 25 L. W. 161; A. I. R. 1927 Mad. 216.
669	Bassa Chinna Reddy v. Gangavaram Govinda Reddi		(1927) M. W. N. 63; 38 M. L. T. 24.
669	Abadi Begum v. Bibi Kaniz Zainab	...	A. I. R. 1927 P. C. 2; (1927) M. W. N. 12; 25 A. L. J. 51; 38 M. L. T. 33; 4 O. W. N. 153; 8 P. L. T. 107; 31 C. W. N. 365; 52 M. L. J. 430; 29 Bom. L. R. 763; 25 L. W. 710; 6 Pat. 259; 45 C. L. J. 408 **P. C.**
676	Krishnasami Pattar v. Gopalakrishna Reddiar	..	25 L. W. 190; 38 M. L. T. 124; A. I. R. 1927 Mad. 421.
677	Mathonkandi Kannan v. Thayyil Pakkutti Avvulla Haji	...	52 M. L. J. 1; (1927) M. W. N. 8; 25 L. W. 61; 38 M. L. T. 156; A. I. R. 1927 Mad. 288; 50 M. 403.
681	Yusaf Ali Hakim Ji v. Mohammad Din & Sons	...	A. I. R. 1927 Lah. 132.
681	Phakiru Panigrahi v. Kothapalli Chendrasekaharam		(1926) M. W. N. 956; A. I. R. 1827 Mad. 215.
682	Muhammad Bakhsh v. Muhammad Fazal	...	27 P. L. R. 775.
683	Appathorai Odayar v. Official Receiver, Tanjore	...	A. I. R. 1927 Mad. 412.
684	Malla v. Mohammad Sharif	...	8 Lah. 212.
685	Mahanthaya v. Nandiappa Hegde	...	*Madras High Court.
686	Jagannath Prosad Singh v. Surajmul Jalal	..	A. I. R. 1927 P. C. 1; 25 A. L. J. 23; 4 O. W. N. 46; 31 C. W. N. 390; 52 M. L. J. 373; 38 M. L. T. 73; 8 P. L. T. 173; 45 C. L. J. 279; 54 C. 161; 25 L. W. 685; 29 Bom. L. R. 752 **P. C.**
687	Ponnammal v. Pichaithevan	...	24 L. W. 826; 52 M. L. J. 33; A. I. R. 1927 Mad. 204.
690	Champa Lal-Madho Lal v. Banarsi Dass	..	A. I. R. 1927 Lah. 134.
691	Pathinti Gundappa v. Karnam Narasappa	..	A. I. R. 1927 Mad. 455.
692	Chawa v. Ahmad	...	8 Lah. 144; A. I. R. 1927 Lah. 143.
694	Kruttiventi Perraju v. Sabbella Bapireddi	..	25 L. W. 69; A. I. R. 1927 Mad. 284.
698	Nizam Din v. Ali Mohammad	.	*Lahore High Court.
699	Noothalapati Ankama Naidu v. Noothalapati Beeki Naidu	...	38 M. L. T. 79; A. I. R. 1927 Mad. 449.
700	Koragalva v. Takri Beary	...	52 M. L. J. 8; A. I. R. 1927 Mad. 261.
703	Ichhar Singh v. Bur Singh	...	*Lahore High Court.
705	Manikam Pillai v. Venkatesa Chetti	..	A. I. R. 1927 Mad. 494.
708	Bhanjan Ram v. Official Receiver, Muzaffargarh	..	A. I. R. 1926 Lah. 621; 27 P. L. R. 513.
709	Punyam Viswanatha Reddi v. Galiraja Venkata Reddi	...	(1927) M. W. N. 1; 25 L. W. 223; A. I. R. 1927 Mad. 278.
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717	Maung Pway v Saya Pe	...	4 R. 408; A. I. R. 1997 Rang. 46.
718	Purna Chandra Kundu v. Manobini Devi	...	53 C. 913; A. I. R. 1927 Cal. 156.
720	Periaswami Nainar v. Kandasami Nainar	..	*Madras High Court.
723	Steel Bros. & Co., Ltd. v. Ahmed Ibrahim Bros.	....	4 R. 401.
726	Jagannath Prasad Singh v. Mahesh Prasad Singh	..	L. R. 7 A. 420 Rev.; A. I. R. 1927 All 245.
727	Swedish Match Company v. Adamjee Hajee Dawood & Co. Ltd.		
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735	Joint & United Hindu Family of K. V. v. P. L. P. K. R. M. K. Chettyar Firm	...	*Lahore High Court.
736	Rustomjee Dorabjee v. K. D. Brothers	...	5 Bur. L. J. 179; A. I. R. 1927 Rang. 39.
742	Somasundaram Chetty v. Subbramaniam Chetty	..	53 C. 866; 44 C. L. J. 454; A. I. R. 1927 Cal. 163.
748	R. M. K. S. Firm v. Maung Ba Gyaw	...	(1926) M. W. N. 832; A. I. R. 1926 P. C. 136; 4 O. W. N. 1; 25 L. W. 163 **P. C.**
749	Umed Mal v. Chand Mal	...	5 Bur. L. J. 171; A. I. R. 1927 Rang. 44.
			A. I. R. 1926 P. C. 142; 3 O. W. N. 989; 53 I. A. 271; 25 L. W. 80; 25 A. L. J. 61; (1927) M. W. N. 84; 38 M. L. T. 43; 28 P. L. R. 113; 31 C. W. N. 413; 52 M. L. J. 368; 45 C. L. J. 274; 8 P. L. T. 251; 29 Bom. L. R. 755; 54 C. 338 **P. C.**

751	Jiwan Mal v. Lachman Das	..	27 P. L. R. 351; 8 Lah. L. J. 150; A. I. R. 1926 Lah. 486.
752	Muhammad Umar v. Wali	...	2 Lah. L. J. 306.
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755	Nihal Shah v. Malan	...	2 Lah. L. J. 457.
756	Miran Bakhsh v. Allah Bakhsh	...	8 Lah. 111.
757	Rameswar Bazaz v. Shyama Sundari Debi	...	A. I. R. 1926 P. C. 37; (1926) M. W. N. 525 P. C.
759	Vellasawmy Servai v. Sevaraman Servai	..	5 Bur. L. J. 176; A. I. R. 1927 Rang. 56; 5 R. 119.
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760	U Aung Din v. Ma Ngwe	..	5 Bur. L. J. 174; A. I. R. 1927 Rang. 72.
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763	Arjamand Khan v. Shankar Lal	...	A. I. R. 1922 Lah. 364.
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769	Gujabai v. Purshottam	..	A. I. R. 1927 Nag. 158.
770	Mrs. H. B. Morton v. Woodfall	..	9 Lah. L. J. 25; 28 P. L. R. 15; A. I. R. 1927 Lah. 103; 8 Lah. 257.
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774	Bhikarilal v. Ramadin	...	A. I. R. 1927 Nag. 157.
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779	Vithu Mahali v. Virthu Mahadji	..	A. I. R. 1927 Nag. 164.
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782	Ram Sumran Prasad v. Gobind Das	..	5 Pat. 646; A. I. R. 1926 Pat. 582; 7 P. L. T. 821.
812	Kidar Nath-Behari Lal v. Shimbhu Nath-Nandu Mal	..	A. I. R. 1927 Lah. 176; 8 Lah. 198; 28 P. L. R. 351.
814	Basangouda Budangouda Patil v. Rudrappa Mallappa Nidwani	...	28 Bom. L. R. 1507; A. I. R. 1927 Bom. 87.
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820	Irangauda Shidramgauda Patil v. Irbasappa Gangappa Dalal	...	28 Bom. L. R. 1516; 51 B. 31; A. I. R. 1927 Bom. 84.
822	Aya Ram-Tolaram v. Bhajan Ram	....	A. I. R. 1927 Lah. 158; 8 Lah. 205.
823	Kanhailal-Badri Das v. Ismailbhai Kasambhai	..	28 Bom. L. R. 1498; A. I. R. 1927 Bom. 140.
828	Swaminatha Iyer v. Ramaswami Iyer	...	38 M. L. T. 8.
829	Badri Das v. Sundar Das	...	A. I. R. 1927 Lah. 166.
831	Tanjore Palace Estate v. Thiyagaraja Pillai	...	50 M. L. J. 183; A. I. R. 1923 Mad. 160.
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857	Kheri v. Emperor	...	3 Lah. L. J. 147; 28 Cr. L. J. 185.
858	Yeshodi v. Emperor	..	9 N. L. J. 194: A. I. R. 1927 Nag. 43; 28 Cr. L. J. 186.
860	Nga San Tin v. Emperor	...	5 Bur. L J. 170; 28 Cr. L. J. 188.
860	Jairam Singh v. Emperor	...	28 Cr. L. J. 188.
861	Gulabchand v. Emperor	...	28 Cr. L. J. 189; A. I. R. 1927 Nag. 163.
862	Jwala Singh v. Emperor	...	28 Cr. L. J. 190; A. I. R. 1927 Lah. 164.
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875	Shankar Das v. Dittu Ram-Idan	..	8 Lah. L. J. 601; 28 P. L. R. 24; A. I. R. 1927 Lah 72.
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902	Ramanathan Chetti v. Muthu Valliappa Chetti	...	52 M. L. J. 59; A. I. R. 1927 Mad. 322.
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910	Pramatha Nath Roy Chowdhury v. Bejoy Singh Dudhuria	..	44 C. L. J. 537; A I. R. 1927 Cal. 231.
912	Krishna Kumari Devi v. Rajendra Bahadur Sinha Deo	...	4 O. W. N. 50; A. I. R. 1927 Oudh 125; 13 O. L. J. 900.
917	Kalimata Debi v. Narendra Nath Chuckerbutty	...	44 C. L. J. 522; A. I. R. 1927 Cal. 244.
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929	Chanan Singh v. Emperor	..	8 Lah. L. J. 610; 28 P. L. R. 39; 28 Cr. L. J. 193; A. I. R. 1927 Lah. 78.
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935	Mehr Din v. Emperor	...	28 Cr. L. J. 199; A. I. R. 1927 Lah. 162.
937	Isu Sheikh v. Emperor	...	31 C. W. N. 171; 28 Cr. L. J. 201; A. I. R. 1927 Cal. 200; 45 C. L. J. 584.
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941	Hemendra Prasad Ghose v. Emperor	...	31 C. W. N. 168; 28 Cr. L. J. 205; A. I. R. 1927 Cal. 215; 45 C. L. J. 432.
943	P. R. M. K. Muhammad Abdul Rahiman Maracayar, *In re*	...	38 M. L. T. 15; 28 Cr. L. J. 207; A. I. R. 1927 Mad 434.
943	Yusaf Beg Sahib v. Mahomed Sayad Sahib	...	25 L. W. 357; 28 Cr. L. J. 207; A. I. R. 1927 Mad. 397.
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944	Ahmed Meera Sahib v. Meeran Sahib	...	25 L. W. 358; 28 Cr. L. J. 208; A. I. R. 1927 Mad. 393.
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ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 538 OF 1924.

November 1, 1926.

Present :—Mr. Justice Kendall.

Lala PUTTU LAL—DEFENDANT—APPELLANT

versus

RAM SINGH AND OTHERS PLAINTIFFS AND *Musammat* NANHI KOER—DEFENDANT—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 41—Transfer by ostensible owner—Reasonable care and good faith—Burden of proof—Appeal, second—Mixed question of law and fact.

A person seeking the protection of the provisions of s. 41 of the Transfer of Property Act must show that his transferor was the ostensible owner of the property, that he himself acted with reasonable care and that he also acted in good faith. [p. 1, col. 2.]

The decision of the question whether reasonable care has or has not been taken in such a case is a mixed question of law and fact and can be discussed in second appeal, but it is a question of a kind in which the second Appellate Court will be reluctant to interfere with the decision of the lower Court unless very strong grounds are made out. [p. 2, col. 1]

A person taking a transfer from a Hindu widow without making any inquiries as to the interest of the widow in the property cannot he said to have acted with reasonable care merely because he finds that the widow is shown in the revenue papers as owner of the property transferred. [p. 2, cols. 1 & 2.]

Second appeal against a decree of the Subordinate Judge, Budaun, dated the 15th of December, 1923.

Mr. *N. P. Asthana*, for the Appellant.

Mr. *S. N Gupta*, for the Respondents.

JUDGMENT.—This second appeal is from the order of the Subordinate Judge of Budaun, confirming an order of the first Court giving the plaintiff respondents possession of a certain share, which had been the property of one Baldeo Singh. The share in question had been transferred by a deed of sale by *Musammat* Nanhi Koer to the present appellant in 1923; but the lower Courts have found it proved that *Musammat* Nanhi Koer had no legal title to the property, although her name had been entered in the revenue papers as in joint possession of it together with the nephews of Baldeo Singh since 1916. Both the lower Courts held that the present appellant had no legal title to the property, and, therefore, decreed the plaintiffs' suit. On second appeal in the High Court, the case was remanded for a decision on the following issue :—

"Did the respondents, or any of them, and if so, which, take part in negotiating the sale of *Musammat* Nanhi Koer in favour of Puttu Lal appellant."

It had been claimed on behalf of the appellant that the plaintiff-respondents are estopped from contesting the sale in favour of the appellant because they had actually negotiated the sale in favour of the appellant; but the finding after remand is that none of the plaintiff-respondents took part in negotiating the sale, and the plea of estoppel must, therefore, fall to the ground.

The other plea that had been taken on behalf of the appellant is that he is protected by the provisions of s. 41 of the Transfer of Property Act. It is necessary for him to show that the vendor was the ostensible owner, that he acted with reasonable care and that he also acted in good faith. There is no doubt that the vendor was recorded as a part owner of the property of Baldeo Singh together with Baldeo Singh's nephews, and that she had been so recorded for seven years. Nothing has been said to impugn the appellant's good faith; but it is necessary to consider whether in buying this property from a Hindu a widow he acted with reasonable care. The facts found proved by the lower Courts are that he looked at the *khewat* Had he taken one further step and looked at the application for mutation, he would have further found that the nephews

of Baldeo Singh, respondents in the present proceedings, had applied for mutation in favour of *Musammat* Nanhi Koer as well as of themselves. It is urged on behalf of the appellant that this shows reasonable care on his part. Both the lower Courts have held that he did not act with reasonable care. The lower Appellate Court remarks: "The appellant himself was aware of the facts, which go to show that Nanhi Koer could not be entitled to the share she has sold. He admits that." If this is so, if he knew the facts there would be no need for him to make enquiries; and he may have thought that the present respondents would be estopped. As shown above by me, they are not estopped for negotiating the sale; and it is not argued that the mere fact of allowing the mutation to be made in the widow's name can act as an estoppel to the claim to the title. I agree with the learned Counsel for the appellant that the decision of whether reasonable care has been taken is a mixed question of law and fact, and may be raised in second appeal; but I think it is a question of a kind in which the second Appellate Court will be very reluctant to interfere with the decision of the lower Courts, unless very strong grounds are made out. On behalf of the appellant I have been referred to two cases reported as *Mul Raj* v. *Fazl Imam* (1) and *Mathura Prasad* v. *Anandi Kunwar* (2), but both these cases show very much stronger grounds for maintaining the vendee's title than the present case. On the other hand, in *Ballu Mal* v. *Ram Kishun* (3), it was held that "a person who takes a mortgage from one whom he knows to be a sister's son of the last owner, (a Hindu), ought to take reasonable care to enquire and ascertain as to whether there are any collaterals in existence of the last owner; and if it is not shown that he made any such enquiries, he is not entitled to the protection given by s. 41 of the Transfer of Property Act." In the present case, the vendee knew that the nephews of Baldeo Singh had a legal claim to the property, and it appears that he might have easily enquired why they consented to allow his vendor's name to be recorded as a part owner; whereas he himself knew that her title was not a good one. I do not feel that in the circumstances it can be held in second appeal, against the findings of the lower Courts, that he acted with reasonable care, and that he can claim the protection of s. 41 of the Transfer of Property Act. The result is that the appeal is dismissed with costs.

Z. K. *Appeal dismissed.*

(1) 74 Ind. Cas. 307; 21 A. L. J. 424; 45 A. 520; A. I. R. 1923 All. 583.

(2) 74 Ind. Cas. 911; 21 A. L. J. 498; A. I. R. 1924 All. 63.

(3) 64 Ind. Cas. 14; 19 A. L. J. 11; 43 A. 263.

OUDH CHIEF COURT.

SECOND CIVIL APPEAL No. 153 OF 1926.

November 12, 1926.

Present :—Mr. Justice Hasan.

JIA LAL—DEFENDANT—APPELLANT

versus

SAERA BIBI—PLAINTIFF AND OTHERS—DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), s. 115—Estoppel by conduct—Mortgagee enforcing mortgage without disclosing agreement for sale—Subsequent suit for specific performance of agreement to sell—Estoppel.

S held a mortgage of a grove from *A*. Subsequently *A* agreed to sell the grove to *S*. A creditor of *A* attached the grove in execution of a simple money-decree against *A* and had half of it sold to *J* for Rs. 35. *S* then purchased the other half from *A*. After this *S* brought a suit for sale of the half grove held by *J* on the basis of the mortgage. *A* and *J* were impleaded in this suit. *J* paid the amount of the mortgage-money which was accepted by *S*. Subsequently *S* sued for specific performance of the contract of sale for half the grove purchased by *J* :

Held, that *S* was estopped by his conduct from setting up his contract for sale and suing for specific performance of the same. [p. 3, col. 2.]

Second appeal from a decree of the Second Additional District Judge, Unao, dated the 16th March, 1926, reversing that of the Munsif, North Unao, dated 16th October, 1925.

Mr. *D. K. Seth*, for the Appellant.

Mr. *Motilal Saksena*, for the Respondents.

JUDGMENT.—This is the appeal by Jia Lal defendant from the decree of the Additional District Judge of Luckow at Unao dated the 16th of March, 1926, reversing the decree of the Munsif, North Unao, dated the 16th of October, 1925.

The facts are as follows:—

Akbar Khan who is one of the defendants to the suit, out of which this appeal arises, was the owner of a grove situated on Nos 3718, 3719-I and 3773 I at Unao. On the 11th of August, 1922, he made a mortgage of that grove for a sum of Rs. 100 in favour of *Musammat* Saera Bibi, the plaintiff-respondent. On the 15th of August,

1922, it is common ground, Akbar Khan entered into an agreement with *Musammat* Saera Bibi to sell that grove to her for a sum of Rs. 140. The sale price was to include the mortgage money due under the deed of the 11th of August, 1922. On the date of the agreement Rs. 20 were paid by *Musammat* Saera Bibi to Akbar Khan by way of earnest money towards the contemplated sale.

One Sri Narain, another defendant in the suit, held a simple money-decree against Akbar Khan. In the process of execution of that decree Sri Narain attached the grove in question. On the 7th of November, 1922, *Musammat* Saera Bibi preferred objections against the attachment under O. XXI, r. 58 of the C. P. C. In this petition of objections she stated that the grove was held by her under a mortgage and that there was a contract for sale in respect of it between her and Akbar Khan. That petition was summarily dismissed by the Court seized of the execution proceedings.

On the 26th of May, 1923, *Musammat* Saera Bibi instituted a suit for a declaration that the grove in question was not liable to attachment and sale on the grounds that it was held by her under a mortgage and that it was subject to a contract of sale in her favour. The suit was dismissed on the ground that the contract of sale created no charge in favour of *Musammat* Saera Bibi and that the grove could be sold subject to her mortgage. The result was that half of the grove in question was sold in execution of Sri Narain's decree and purchased on the 13th of October, 1923, by Jia Lal the defendant-appellant, for a sum of Rs. 35. Sometime afterwards probably on the 11th July, 1923, as the statement of one of the witnesses shows, *Musammat* Saera Bibi purchased the remaining half of the grove from Akbar Khan. Having done this she brought a suit on the basis of the mortgage of the 11th of August, 1922, for sale of the half share of the grove which was purchased by Jia Lal on the 13th of October, 1923. To this suit both Akbar Khan and Jia Lal were impleaded as defendants. On the 26th of May, 1924, the Court granted a decree for sale of the half share of the grove As usual, the defendants both Akbar Khan and Jia Lal were laid under an obligation to pay the whole of the mortgage-money, that is Rs 100 principal and Rs. 1'-15 interest within a certain time if either of them wished to avert the sale of the half share of the grove. They were also made liable for the costs of the suit. In pursuance of this decree Jia Lal deposited in Court the sum of Rs. 11n-15 on the 27th of January, 1925, and *Musammat* Saera Bibi realized the deposit.

Now we come to the suit, out of which this appeal has arisen. It was laid for the relief of specific performance of the contract of sale for the half share of the grove which was bought by Jia Lal at auction-sale on the 13th of October, 1923. *Musammat* Saera Bibi offered to pay Jia Lal the sum of Rs. 20 which she had paid to Akbar Khan in pursuance of the contract of sale. Amongst other defences Jia Lal raised the defence of estoppel.

The trial Court dismissed the suit. On appeal by *Musammat* Saera Bibi the learned Additional District Judge has reversed the decree of the trial Court as already stated and granted the relief of specific performance of the contract of sale to her by imposing upon her the condition of payment of Rs. 20 and also half of the mortgage-money to Jia Lal. The learned Judge states in his judgment that no question of Jia Lal's notice or knowledge of the agreement of sale was raised in this case or appeal.

The above are all the facts.

I am of opinion that the appeal succeeds on the plea of estoppel. As regards that plea the learned Judge observes that the plaintiff, *Musammat* Saera Bibi, relied on the contract of sale in the objection proceedings under O. XXI, r. 58, of the C. P. C. and also in the suit which followed it and concludes that that was sufficient evidence to establish the fact that "she never waived her right to the sale of the grove to her." This observation of the learned Judge is wholly immaterial to the plea of estoppel. Jia Lal was no party either to the objection proceedings or the declaratory suit following those proceedings and it is agreed that he had no knowledge of the contract of sale. Therefore, the plaintiff's acts and declarations in respect of her rights under the contract of sale are of no consequence. What is of consequence are the facts that when in the suit for sale the plaintiff, *Musammat* Saera Bibi, and Jia Lal were brought face to face she omitted to mention her claim for specific performance on the basis of the contract of sale and further she obtained a decree for the mortgage-money as against Jia Lal and there-

by by her conduct induced in him the belief that he was the owner of the half share of the grove. The climax was reached when she accepted the payment of the mortgage-money from the hands of Jia Lal. These facts fully establish in my judgment the plea of estoppel raised by Jia Lal as a defence to the plaintiff's suit.

The law of estoppel so far as British India is concerned is embodied in s. 115 of the Indian Evidence Act, 1872. That section well bears reproduction here.

"When one person has, by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."

In terms of the above section *Musammat* Saera Bibi both by her act and omission permitted Jia Lal to believe that he was the owner of the half share of the grove and that Jia Lal acting on that belief allowed himself to have been rightly impleaded in the suit for sale in the character of the owner of half of the grove and in that character he made payment of the mortgage-money and *Musammal* Saera Bibi, the plaintiff, accepted the payment from Jia Lal in the character of an owner of the share in suit. The observations of the Right Hon'ble Sir Montague E. Smith in the case of *Munnoo Lall* v. *Lalla Chhoonee Lall* (1) are to my mind wholly apposite to the present case. That was a case in which estoppel was pleaded as against a claim to enforce a security. It was found that the security was kept secret from the defendants when they purchased the subject of the security. In that state of facts Sir Montague E. Smith observed:—"If then the issue has been properly found, it is really decisive of the case, because it supports the plain equity that a man who has represented to an intending purchaser that he has not a security, and induced him under that belief to buy, cannot, as against that purchaser, subsequently attempt to put his security in force."

I allow this appeal, set aside the decree of the lower Appellate Court and restore the decree of the Court of first instance with costs all through. The cross-objections are dismissed. No order as to costs as regards them.

G. H. *Appeal allowed.*

A. N A.

(1) 1 I. A. 144; 21 W. R. 21; 3 Sar. P. C. J. 302 (P. C.).

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1182 OF 1926.

October 25, 1926.

Present:—Mr. Justice Jai Lal.

SOHNA MAL—PLAINTIFF—APPELLANT

versus

BUDH MAL AND ANOTHER—DEFENDANTS—RESPONDENTS.

Burden of proof—Shifting of burden in appeal—Remand.

Where an Appellate Court shifts the burden of proof from one party to the other, the latter is entitled to a remand to enable him to produce his evidence. [p. 5, col. 1.]

Second appeal from a decree of the District Judge, Gujranwala, dated the 15th March, 1926, reversing that of the Subordinate Judge, Second Class, Gujranwala, dated the 12th October, 1925.

Messrs. *C. H. Oertal* and *G. S. Salarya*, for the Appellant.

Dewan *Mehr Chand* for Lala *Badri Nath* and Mr. *Ram Das Seth*, for the Respondents.

JUDGMENT.—The plaintiff-appellant instituted a suit against the defendants for the recovery of principal and interest due on a balance of Rs. 800 acknowledged by the defendants in the plaintiff's book on the 26th November, 1924. The defendants admitted having signed the entry but denied receipt of consideration. The trial Court framed the following issue:—

"Is the entry without consideration? O. P. on defendants and after recording the evidence of the parties decreed the suit with costs.

The learned District Judge on appeal by the defendants came to the conclusion that under the circumstances the onus was on the plaintiff to prove that he had really paid the sum of Rs. 800 mentioned in the entry. He considered the evidence produced by the plaintiff and held that it was not sufficient to discharge the burden and dismissed the suit. The grounds on which the learned Judge held that the burden of proof was on the plaintiff to prove consideration were that in his opinion the document did not contain an admission or recital of the payment of consideration and that immediately after its execution the

defendants reported to the Police that the plaintiff had obtained it from them fraudulently and then filed a complaint in the Court of the Magistrate making the same allegations.

Though I am not prepared to agree with the learned District Judge that the document did not contain an admission of the receipt of consideration, still I am of opinion that his conclusion is correct, that under the circumstances the burden of proof shifted to the plaintiff to prove payment of consideration to the defendants. The principal complaint of the plaintiff-appellant before me is that as the learned District Judge had shifted the burden of proof on the plaintiff he should have remanded the case to the trial Court to enable the plaintiff to prove the consideration of the document in suit. It was asserted that the evidence produced by the plaintiff was merely in rebuttal of the evidence given by the defendants and that he did produce the whole of his evidence because he fealt satisfied that the defendants on whom the burden of proof lay had not discharged the same. I think there is force in this contention. On the burden of proof having been shifted from the defendants to the plaintiff the latter was entitled to a remand to enable him to produce his evidence.

I accept this appeal, set aside the decree of the learned District Judge and remand the case to the trial Court for recording the evidence of both parties on the assumption that the burden of proving payment of consideration in respect of the document in suit is on the plaintiff. The Court-fee paid on the memorandum of appeal in this Court will be refunded and the other costs will abide the result.

R. L. *Case remanded.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 525 OF 1924.

November 10, 1926.

Present:—Mr. Justice Iqbal Ahmad.

DWARKA PRASAD AND ANOTHER—DEFENDANTS—APPELLANTS

versus

BISHAMBHAR DAYAL—PLAINTIFF—RESPONDENT.

***Easement—Light**, obstruction of, when actionable.*

The owner of a dominant tenement does not obtain **by his easement a** right to all the light he has enjoyed during the period of prescription. He obtains a right to so much of it only as will suffice for the ordinary purposes of inhabitancy or business according to the ordinary notions of mankind having regard to the locality and surroundings. There is no infringement of the easement acquired by ancient lights unless the act which is done amounts to a nuisance. [p. 6, cols 1 & 2.]

A person cannot, therefore, restrain another from erecting a building merely on proof of the fact that the building which is proposed to be constructed will materially diminish the light which the plaintiff enjoys for his house unless he proves that the proposed building would amount to a nuisance in the sense that it would render the plaintiff's building "unfit for the ordinary purposes of inhabitancy or business according to the ordinary notions of mankind having regard to the locality and surroundings." [p. 6, col. 2; p. 7, col. 1.]

Second appeal from a decree of the Additional Subordinate Judge, Mainpuri, dated the 7th of January, 1924.

Mr. *Baleshwari Prasad*, for the Appellants.

Mr. *U. S. Bajpai*, for the Respondent.

JUDGMENT.—The parties to this appeal are neighbours. The defendants' house is to the south of the plaintiff's house. On the first floor of the plaintiff's house there is a room in which there are many doors and there is a window towards the south of that room. Close to this window the defendants have made certain constructions by which the lower portion of the window to the extent of about 9 inches has been blocked. The defendants also intend to make some other constructions above the construction just referred to.

The suit giving rise to this appeal was filed by the plaintiff respondent mainly on the allegation that the constructions made by the defendants interfered with the enjoyment of light and air through the window in the southern wall of the plaintiff's house and as such, the plaintiff was entitled to a decree for demolition of the said constructions. It was further alleged by the plaintiff that, if the defendants were allowed to make some other constructions above the constructions sought to be demolished, the plaintiff's right of easement will be prejudicially affected and as such, the plaintiff prayed for a perpetual injunction restraining the defendants from making any further constructions calculated to block the window in the plaintiff's room.

The defence to the suit was that the room on the first floor of the plaintiff's house was built less than 20 years prior

to the institution of the suit and as such, the plaintiff had not acquired a right of easement with respect to light and air as alleged by him and that the constructions complained of did not materially interfere with the right of easement alleged by the plaintiff.

The trial Court came to the conclusion that the room and the window in dispute existed for more than 20 years and as such the plaintiff had the right of easement claimed by him; but the constructions made by the defendants did not substantially interfere with the enjoyment of air and light through the window referred to above and as such, it dismissed the suit for demolition of the constructions made by the defendants. It was further of opinion that if the defendants made some other constructions above the constructions sought to be demolished, there will be a substantial interference with the right of easement enjoyed by the plaintiff and as such, it passed a decree in favour of the plaintiff perpetually restraining the defendants from making any constructions over the constructions already made by them.

Both parties were dissatisfied with the decree of the trial Court, with the result that the defendants filed an appeal against that portion of the decree of the trial Court which was in favour of the plaintiff-respondent and the plaintiff filed cross-objection with respect to the portion of the claim that was dismissed.

The lower Appellate Court has upheld the decree of the trial Court in its entirety and has dismissed both the appeal and the cross-objection. The defendants-appellants assail the decree of the lower Appellate Court on the ground that the lower Appellate Court has misdirected itself in law in proceeding on the assumption, that the mere fact that any constructions contemplated by the defendants will materially diminish the light and air received through the window in dispute, is a valid ground for granting the injunction prayed for by the plaintiff-respondent. It is urged that in the absence of a definite finding to the effect that the contemplated constructions would amount to an actionable nuisance, a decree restraining the defendants from making any constructions should not have been passed. It is a well-settled proposition of law that "the owner of a dominant tenement does not obtain by his easement a right to all the light he has enjoyed during the period of prescription. He obtains a right to so much of it as will suffice for the ordinary purposes of inhabitancy or business according to the ordinary notions of mankind having regard to the locality and surroundings" [*vide Peter Charles Ernest Paul* v. *William Robson* (1)] It has also been held in the case just noted that "there is no infringement of the easement acquired by ancient lights unless the act which is done amounts to a nuisance."

Reading the judgments of the Courts below it appears to me that neither of those Courts had in view this pronouncement of their Lordships of the Privy Council in the case just cited. Both the Courts below seem to have approached the consideration of the question on the assumption that "a material diminution" of the light and air received through the window in question could furnish a cause of action to the plaintiff-respondent for maintaining a suit of the description that he filed against the defendants-appellants. In this the Courts below were clearly wrong The lower Appellate Court observes in the course of its judgment that "as the second storey upon this room of the defendants would block the plaintiff's window altogether, the plaintiff is entitled to get the injunction prayed for." The mere fact that the making of a room would block the plaintiff's window would not by itself entitle the plaintiff-respondent to obtain a decree for perpetual injunction of the description granted to him by the Courts below against the defendants-appellants. In the absence of a definite and clear finding that the constructions contemplated by the defendants would amount to a nuisance, the plaintiff-respondent would not be entitled to a decree in the terms of the decrees of the Courts below.

As in my opinion the lower Appellate Court, without correctly appreciating the law on the subject, has recorded the findings which are not enough for the disposal of this appeal, I cannot decide this appeal without having a finding on the following issue from the lower Appellate Court:—

Whether or not the constructions contemplated to be made by the defendants-

(1) 24 Ind. Cas. 300; 12 A. L. J. 1166; 18 C. W. N. 933; 27 M. L. J. 117; 1 L. W. 561; 16 M. L. T. 204; (1914) M. W. N. 631; 16 Bom. L. R. 803; 20 C. L. J. 353; 42 C. 46; 41 I. A. 180 (P. C.).

appellants over the room already built by them will amount to a nuisance?

In deciding this issue the lower Appellate Court should remember that unless it comes to the conclusion that by the constructions the house of the plaintiff-respondent will become unfit "for the ordinary purposes of inhabitancy or business according to the ordinary notions of mankind having regard to the locality and surroundings," it cannot be said that the contemplated constructions by the defendants would amount to a nuisance.

The parties will be at liberty to adduce fresh evidence. The lower Appellate Court should return the finding to this Court within two months from this date. On return of the finding the usual ten days will be allowed for filing objections.

Z. K. *Order accordingly.*

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 1347 OF 1926.

October 22, 1926.

Present:—Mr. Justice Coldstream.

GHULAM HAIDAR—DEBTOR—APPLICANT APPELLANT

versus

DURGA DAS AND OTHERS—CREDITORS—RESPONDENTS.

Provincial Insolvency Act (V of 1920), s. 10—'Unable to pay', meaning of.

Under s. 10, Provincial Insolvency Act, a petitioner has to prove only that he is unable to pay his debts, not that he will never be able to pay his debts. The fact that the petitioner's father and other relations are wealthy and that the petitioner would one day succeed to them is, therefore, no ground for rejecting an application to be declared an insolvent.

Miscellaneous first appeal from an order of the District Judge, Gurdaspur, dated the 29th March, 1926.

Mr. *M. A Ghani*, for the Appellant.

Messrs. *Faqir Chand* and *Maya Das*, for the Respondents.

JUDGMENT.—I dispose in this order of the two appeals Nos. 1347 and 1348 of 1926 by Ghulam Haidar and Ghulam Hussain, respectively.

The appellants, who are brothers, petitioned the District Judge of Gurdaspur under s. 13, Provincial Insolvency Act, to be declared insolvents. The applications were opposed by creditors. The learned District Judge dismissed both petitions mainly on the grounds that their father owned 500 *kanals* of land and that their uncle Miran Baksh was sonless and the petitioners would one day succeed to his property It is obvious that these are not good grounds for rejecting insolvency petitions. Under s. 10 of the Act a petitioner has to prove that he is unable to pay his debts, not that he will never be able to pay his debts. In the brief order appealed against the learned District Judge has, it is true, remarked that the petitioners could pay their debts if they wished, but apart from the fact that the petitioners' father and uncle have land there appears to be no evidence to justify this finding.

It appears that the learned District Judge did not think it necessary to call upon the creditors to rebut the evidence produced by the petitioners in view of his opinion that the assets of the petitioners' father and uncle justified the dismissal of the petitions. The evidence produced by the petitioners, if unrebutted, goes to show that they cannot pay their debts and the creditors should be allowed an opportunity to rebut this evidence. On behalf of the creditors Mr. Faqir Chand states that he has no objection if the petitioners are allowed to add to the evidence they have already produced so long as an opportunity to rebut it is allowed to the creditors.

In the circumstances of the case I accept both appeals and setting aside the orders of the District Judge remand both cases to him for disposal according to law. If he finds after hearing all the evidence that is produced that the debtors have proved that they are unable to pay their debts and that they owe Rs 500, the petitioners will be entitled to be declared insolvents. If he finds that the petitioners have not proved that they are unable to pay their debts and that their debts amount in each case to Rs. 500, he will dismiss the applications. Costs to be costs in the case.

A. N. A. *Cases remanded.*

MADRAS HIGH COURT.
FULL BENCH.

LETTERS PATENT APPEALS NOS. 125 AND 126 OF 1924.

August 13, 1926.

Present :—Sir Kumaraswami Sastri, KT., Officiating Chief Justice, Mr. Justice Krishnan, Mr. Justice Ramesam, Mr. Justice Venkatasubba Rao and Mr. Justice Curgenven.

PINNAMAMENI BASAVA SANKARAM (MINOR) BY MOTHER AND GUARDIAN RATTAMMA—PLAINTIFF—APPELLANT

versus

GARAPATI NARASIMHULU AND OTHERS —DEFENDANTS NOS. 3—5, 1 AND 2—RESPONDENTS.

Transfer of Property Act (IV of 1882), ss. 2 (d), 43 —Provincial Insolvency Act (III of 1907), s. 16—Hindu father, adjudication of, as insolvent—Vesting order, absence of—Sale by Official Receiver—Suit by son to set aside sale—Subsequent vesting order with retrospective effect—Sale, validity of—Official Receiver, whether agent of Court—Ratification—Sale by Official Receiver, whether transfer by act of parties.

On an application by a Hindu father to be adjudicated an insolvent, the District Judge passed the order, "transferred to the Official Receiver for disposal." The Official Receiver passed an order of adjudication and proceeded to sell the joint property of the insolvent and his son and a sale-deed was duly executed. The son thereupon brought a suit to have it declared that his share in the property did not pass by the sale and to recover possession of it. The Official Receiver then realising that no order had been passed by the Court vesting the insolvent's property in him applied for and obtained a vesting order with retrospective effect from the date of adjudication:

Held, (1) that the Official Receiver to whom the petition for adjudication was transferred for disposal by the District Judge under the provisions of the Provincial Insolvency Act could not be said to be an agent of the Court within the meaning of the Contract Act so as to enable the Court to ratify the unauthorised sale by him of the insolvent's property; [p. 9, col. 2.]

(2) (*Krishnan, J.* dissenting) that a sale by the Official Receiver acting under the provisions of the Provincial Insolvency Act is not a transfer of property by operation of law or by, or in execution of, a decree or order of a Court of competent jurisdiction, within the meaning of s. 2 (*d*) of the Transfer of Property Act and, therefore, by virtue of s. 43 of the Act the effect of the vesting order, passed subsequently was to validate the antecedent sale; [p. 9, col. 2; p. 10, col. 2.]

(3) that the conditional power of the father under the Hindu Law to dispose of his son's interest in joint family property vested in the Official Receiver, and in the absence of proof of the father's debts having been contracted for any illegal or immoral purpose, the Official Receiver's sale was binding upon the son. [p. 10, col. 2.]

Per *Krishnan, J.*—A sale by an Official Receiver of the insolvent's property is a transfer by order of a Court of competent jurisdiction within the meaning of s. 2 (*d*) of the Transfer of Property Act and the provisions of the Act, are, therefore, inapplicable to such a transfer. [p. 12, col. 1.]

Per *Venkatasubba Rao, J.*—The expression "by act of parties" in s. 2 (*d*) of the Transfer of Property Act connotes that the scope of the Act is limited to voluntary transfers as distinguished from transfers by operation of law. When the property of an insolvent vests in a Receiver in insolvency, there is a transfer by operation of law but when the Receiver transfers the property to an alienee, the alienation is a voluntary transfer and is as much an "act of parties" as any transfer by a private individual. [p. 15, col. 1.]

Letters Patent Appeal against the judgment of Mr. Justice Devadoss, dated the 8th September, 1924, in A. S. Nos. 100 and 101 of 1923, printed in 85 Ind. Cas. 439, preferred to the High Court against the decrees of the Court of the Subordinate Judge, Masulipatam, in A. S. No. 134 of 1922, preferred against the preliminary and final decrees of the Court of the Additional District Munsif, Gudivada, in O. S. No. 159 of 1920.

Mr. *V. Ramadoss*, for the Appellant.

Mr *S. Varadachariar*, for the Respondents.

JUDGMENT.

Kumaraswami Sastri, Offg. C. J.—This is an appeal against the judgment of Devadoss, J., in Second Appeal No. 100 of 1923. The 2nd defendant applied to the District Court of Kistna to be adjudicated an insolvent on the 24th of January, 1918. On the 31st of January, 1918, the District Court transferred the petition to the Official Receiver, the first defendant. The adjudication order was made on the 15th of July, 1918, and the Official Receiver put the property in dispute to sale at an auction held on the 25th of August, 1918, and executed a sale-deed on the 12th of September, 1919. Defendants Nos. 3 to 5 are the purchasers under the sale-deed. The plaintiff who is the son of the 2nd defendant sued for a declaration that the sale by the Official Receiver is invalid, and for a partition and delivery to him of his share. He alleged that the debts contracted by his father were for illegal and immoral purposes not binding on him and that even if the sale is valid his interest would not be affected. On the adjudication of the 2nd defendant, no order vesting the properties in the Official Receiver was made as required by s. 16 of the Provincial Insolvency Act (III of 1907). The properties, therefore, vested in the Court in the absence of an express order vesting them in the Official Receiver. It is clear that

before the order of adjudication which was passed on the 15th of July, 1918, neither the Court nor the Official Receiver could have sold the properties, and that immediately, after the adjudication was made the properties of the insolvent vested in the District Court. After the suit was filed the Official Receiver applied to the Court for a vesting order and an order was made on the 1st of February, 1921. The question which we have to decide is, whether the order made long after the sale-deed executed by the Official Receiver, who, at the time of the execution of sale-deed had no power to sell owing to the absence of a vesting order, validates the sale. The Act in force at the date of the filing of the application by the insolvent was Act III of 1907. Section 16, cl. (2) of that Act provided that on the making of an order of adjudication the whole of the property of the insolvent with the exception of the items mentioned in the section shall vest in the Court or in a Receiver as provided therein and shall become divisible among the creditors. This section is re-enacted as s. 28 of Act V of 1920 and the relevant clauses are 2 and 3. This is, therefore, not a case where the properties continued to remain in the insolvent but a case where after the adjudication order, they vested in the Court and at the date of the sale they must be vested either in the District Court or in the Official Receiver if the vesting order was passed. It is not, therefore, that neither the Court nor the Receiver had the power to sell. One of them under the Act had the power to sell.

The sale by the Official Receiver is sought to be validated on two grounds, namely, that the Official Receiver being only an Officer of the Court and the properties having vested in the Court, the sale by the Official Receiver must be treated as a sale by an authorised agent of the Court subject to ratification and that the vesting order passed subsequent to the sale had the effect of ratifying and validating the sale held by the Official Receiver. It is also contended that s. 43 of the Transfer of Property Act would apply to a case like the present and that even assuming that the Official Receiver sold without title the vesting order gave him a subsequent title which the purchasers could avail themselves of.

As regards the first contention, I do not think that the Official Receiver to whom the matter is transferred for disposal by the District Judge under the provisions of the Provincial Insolvency Act can be said to be an agent of the Court in respect of any acts done by him. The Official Receiver is an Officer appointed by the Local Government under s. 19 of the Provincial Insolvency Act (III of 1907) and where a matter is transferred to him under the powers conferred by the Act he is an Officer who acts not as an agent of the District Court but as a person who under the Act is invested with powers specified therein any more than a Court to which a decree is transferred for execution under the provisions of the C. P. C. can be said to be the agent of the Court transferring the decree. There may be cases where there is something in the order of the Court transferring the matter to the Official Receiver which limits his powers or which can be said to constitute him an agent but in the present case no such limitation exists. I do not think that the Official Receiver or the Official Assignee is an agent of the Court within the meaning of the Indian Contract Act so as to enable the Court to ratify any unauthorised acts done by the agent.

The next question is, whether s. 43 of the Transfer of Property Act would apply. In order to attract the provisions of s. 43 the sale should not fall within s 2, cl. (*d*) of the Transfer of Property Act. Section 2, cl. (*d*) enacts that nothing contained in the Act shall be deemed to affect any transfer by operation of law or by, or in execution of, a decree or order of a Court of competent jurisdiction, except so far as is provided by s. 57 and Ch. IV of the Act. I do not think that a sale by the Official Receiver acting under the provisions of the Provincial Insolvency Act is a transfer of property by operation of law or by, or in execution of, a decree or order of a Court of competent jurisdiction. The order of Court under the Provincial Insolvency Act simply vests the property in the Official Receiver and on such vesting he is under the provisions of the Act entitled to deal with the property in the various modes specified in s. 20 of Act III of 1907, which corresponds to s. 59 of Act V of 1920. I may point out that both ss. 20 and 59 do not require any leave or order of the Court so far as the sale of property is concerned. It is only as regards cls. (*c*) to (*i*) that any leave is necessary. No authority has been cited for the proposi-

tion that a sale by the Official Receiver is a sale in execution of a decree or order of the Court and attracts the advantages and the infirmities attending Court sales. Reference has been made to *Gaya Prasid* v. *Baij Nath* (1) as authority for holding that the sale by the Official Receiver is a sale under an order of Court and s. 2, cl. (*d*) of the Transfer of Property Act applies. There the question arose under the Companies Act and the sale was by the Official Liquidator appointed under the Act who sold under orders of Court. The question whether such a sale would be a Court sale was left undecided. The learned Judges point out that without the order sanctioning the sale, the defendant would have got no title from the Official Liquidator. In the present case there is no order of Court sanctioning the sale by the Official Receiver to the first respondent nor was any order necessary as the Act gave the Receiver full powers of sale. It seems to me that a sale by an Official Receiver acting under the powers conferred by the Act and without any leave or sanction of Court being necessary stands in the same position as a sale by a person in whom the property vests by law for the purpose of administration of an estate subject, of course, to such protection as the law allows to Judicial Officers acting in execution of their office. Though property vests in the Receiver by operation of law the transfer by him is a transfer by one party to another and cannot be said to be a transfer by operation of law in favour of his vendee. Viewing the same in this light, I am of opinion, that the present case falls within s. 43 of the Transfer of Property Act. There is always an implied covenant by the vendor that he has title to sell. Section 55 contains implied covenants in sales of immoveable property and there can be little doubt that when a person sells property there is an implied covenant that he has power to sell. Even assuming that all that the Official Receiver can sell is the right, title and interest of the insolvent, still the Official Receiver covenants that he has authority to transfer such right, title and interest as the insolvent has. It is, of course, open to him by apt covenants to protect himself against any of the infirmities of title or any disputes which may arise as regards the sale. But in the present case it is not contended that the Official Receiver has done so. In the present case the Official Receiver who had no power to sell has sold the property. There is as regards the vendee who had no notice that no vesting order was passed and who was entitled to assume that the Official Receiver was clothed with the requisite authority, the implied covenant that he has title to sell and there is, therefore, an erroneous representation that he is authorised to transfer immoveable property, when, as a matter of fact, he had no such power. The transferees in this case paid consideration for and if the Official Receiver subsequently got authority to transfer the property there is no reason why such subsequent authority should not operate so as to validate the antecedent sale. The case comes strictly within the wording of s. 43. I may point out in this connection that in cases where after a sale it is sought to rectify any defects in the power of the Official Receiver, it is desirable that notice should go to all the parties interested in the property and their objections should be heard as there may arise cases where it is undesirable that the Court should exercise its discretion when it is passing orders the effect of which would be to validate invalid transactions long afterwards and affect the right of third persons. In the present case there is no hardship shown.

As regards the plea that the debts were contracted by the father for illegal and immoral purposes no evidence has been adduced and the appellants' Vakil does not want a remand for the determination of that question.

I had some doubt whether having regard to the decision of their Lordships of the Privy Council in *Sat Narain* v. *Behari Lal* (2) the Official Receiver could sell the interest of the minor which did not vest in him under the guise of exercising the power which the father has. In the case of a father who is a member of a joint family with his sons the whole joint property vests in them jointly. This is not the case where the father becomes an insolvent and his interest only vests in the Official Receiver. But in view of the decision of the Full

(1) 14 A. 176; A. W. N. (1892) 25; 7 Ind. Dec. (N. S.) 483.

(2) 81 Ind. Cas. 883; 6 L. 1; 47 M. L. J. 857; 10 O. & A. L. R. 1332; A. I. R. 1925 P. C. 18; (1925) M. W. N. 1; 23 A. L. J. 85; L. R. 6 A. (P. C.) 1; 26 P. L. R. 81; 27 Bom. L. R. 135; 21 L. W. 375; 1 L. C. 500; 1 O. W. N. 916; 29 C. W. N. 797; 52 I. A. 22 (P. C.).

Bench in *Balavenkataseetharama Chettiar* v. *Official Receiver, Tanjore* (3) I think the matter is concluded by authority.

The Letters Patent Appeal fails and is dismissed with costs.

Krishnan, J.—Letters Patent Appeal No. 125 of 1924 :—To understand the points raised in this appeal facts may be briefly stated as follows. One Muttayya applied in 1918 to be declared an insolvent to the District Court of Kistna. The District Judge passed the order "Transferred to the Official Receiver for disposal" and did nothing else. The Official Receiver adjudicated Muttayya an insolvent and instead of remitting the case to the District Judge for orders appointing him Receiver of the properties and vesting them in him, very carelessly proceeded to sell the joint family property of Muttayya and his son, and the contesting respondents purchased it. Plaintiff has now brought the suit to have it declared that his half share in the property did not pass by the sale and to recover possession of it. While this suit was pending before the District Munsif, the Official Receiver realising his mistake applied in 1921 to the District Judge for a vesting order having retrospective effect from the date of adjudication and he passed an order as follows :—

"The Official Receiver of Kistna is appointed Receiver for the properties of the insolvent with effect from the date of adjudication."

This order was passed without notice to any one three years after the adjudication.

We have to consider the effect of this belated proceeding on the Official Receiver's sale for it is contended that that order has validated the sale which admittedly was an invalid one at its date as the Official Receiver had no power to sell without a vesting order. A number of authorities have laid down in this Court that a sale without a vesting order is invalid and the point must now be taken to be settled. The learned Vakil for the respondent, therefore, wisely conceded the point.

There is no provision in the Insolvency Act to enable a Court to pass orders with retrospective effect and so far as the Judge's order purports to take effect retrospectively it is clearly bad. But the respondents contend that giving it effect as from its date it has validated the sale from that date. The argument is put in two ways. It was first argued that the Official Receiver in selling the property must be treated as having acted as an agent of the Judge and his want of authority was subsequently cured by the Judge's order which amounted to a ratification by the principal of the agent's unauthorised act. It was next argued that s. 43 of the Transfer of Property Act applied and as soon as the Official Receiver got authority to sell, the purchasers could take advantage of it and treat the sale to them as valid.

Taking the question of ratification first, I am of opinion, that the contention cannot be supported. Though it may be, as pointed out in *Subba Aiyar* v. *Ramaswami Aiyangar* (4) the Court could appoint an agent to sell, there is nothing on record in the present case to suggest that the Court did appoint the Official Receiver as such agent; in fact he could not have done so. [See *Kavali Sankara Rao* v. *Turlapati Ramakrishnayya* (5).] Nor is there anything to show that the Official Receiver purported to act as the agent of the Judge. He purported to sell on his own authority under the powers given him by the Act. The fact that he misconceived his powers does not make him an agent. The theory of agency should not be introduced, in my opinion, unless there is some foundation for it on facts. The Official Receiver not being an agent and not having purported to act as an agent, there can be no valid ratification. It is clear law that unless the agent purports to act as such his action cannot be ratified by the principal. In this case there is the further difficulty that nothing appears in the Judge's vesting order implying any ratification of the sale or even to indicate that he knew of the sale. The plea of ratification must, therefore, be rejected.

Turning now to the argument based on s. 43 it seems to me with all respect that the section is not applicable to the present case. Taking the language of the section it has first to be made out that the Official Receiver made an erroneous representation

(3) 97 Ind. Cas. 825; 51 M. L. J. 269; 24 L. W. 345; (1926) M. W. N. 743; A. I. R. 1926 Mad. 994; 49 M. 849 (F. B.).

(4) 62 Ind. Cas. 346; 44 M. 547; 40 M. L. J. 209; 13 L. W. 227; (1921) M. W. N. 135; 29 M. L. T. 233.

(5) 78 Ind. Cas. 294; 46 M. L. J. 184; (1924) M. W. N. 198; 34 M. L. T. 2; 19 L. W. 450; A. I. R. 1924 Mad. 461.

that he was entitled to sell the suit property. The Official Receiver's sale is in my view in the nature of a Court-sale and so far as I can see there is no implied representation involved in it. In such sales there is no covenant for title. What the Official Receiver sells is merely the title of the insolvent if any and the purchaser takes what he can get. If the purchaser fails to get a title he does not thereby get any claim for damages against the Official Receiver as he would against a private seller. Compulsory sales *in invitum* by Courts or by its Officers stand on a very different footing from private sales.

Again it was argued that the Transfer of Property Act was itself excluded from applying to such sales by reason of s. 2, cl. (*d*) of that Act. The words of the section applicable are "transfer by order of a Court of competent jurisdiction" leaving out the other words. I am inclined to think that the Official Receiver's sales come within these words. They are in the nature of Court-sales and their validity really depends on the order of the Insolvency Court vesting the property in the Official Receiver and thus authorising him to sell. The sale is a compulsory sale *in invitum* and the foundation of its validity is the order of the Court. It is open to the Court to set aside a sale by the Official Receiver. The Official Receiver is an Officer of Court and acts as such in effecting sales and not as a private individual. The Act, as its preamble shows, really deals only with transfers of property by act of parties. A similar point was raised before the Allahabad High Court with reference to a sale by the Official Liquidator and their Lordships were inclined to apply cl. (*d*) to such a sale though they did not expressly decide it. No other authority has been cited to us on the point.

For the above reasons with all respect I would hold that s. 43 cannot be applied to this case. It may be mentioned in conclusion that though the plaintiff raised the plea that his father's debts were illegal and immoral he adduced no evidence in support of it.

Having come to the conclusion that the Official Receiver's sale was invalid and it has not been validated in any way I hold that the plaintiff's suit should be decreed. I would, therefore, allow the Letters Patent Appeal and dismiss the second appeal to the High Court with costs in both.

Letter Patent Appeal No. 126 of 1924 follows.

Ramesam, J.—This is a Letters Patent Appeal from the order of Devadoss, J. in S. A. No. 100 of 1923. The 2nd defendant applied to be adjudicated an insolvent on the 24th of January, 1918. The petition was referred for disposal on 31st January, 1918, to the Official Receiver of Masulipatam who is the 1st defendant. The 2nd defendant was adjudicated an insolvent on the 15th July, 1918. The Official Receiver held an auction-sale of the property on 25th August, 1918. Defendants Nos. 3 to 15 are the purchasers by separate sale-deeds. The plaintiff is the son of the 2nd defendant. He sued for a declaration that the sale by the first defendant of the plaintiff's share of the property to defendants Nos. 3 to 5 is invalid and for partition and recovery of his share. When the 2nd defendant was adjudicated an insolvent no vesting order in a Receiver was made under s. 16 of the Act of 1907 under which the proceedings were taken. The result was that the whole property of the insolvent vested in the Court under s. 16, cl. 2 (*a*). It has been held in a series of decisions in this Court that an express vesting order must be made so as to vest the property in the Official Receiver and if no such order was made the property vests only in the Court. See *Official Receiver of Trichinopoly* v. *Somasundaram Chettiar* (6), *Ramakrishna Iyer* v. *Official Receiver, Tinnevelly* (7), *Vythilinga Padayachi* v. *Ponnuswami Padayachi* (8), *Kavali Sankara Rao* v. *Turlapati Ramakrishnayya* (5), *Sankaranarayanam Pillai* v. *Rajamani* (9), *Muthusami Swamiar* v. *Somoo Kandiar* (10) and *Subba Aiyar* v. *Ramaswami Aiyangar* (4). In the decision in *Muthusami Swamiar* v. *Somoo Kandiar* (10) Seshagiri Iyer, J., seems to have come to the conclusion with great hesitation and gave no reasons in support of the conclusion, being merely

(6) 34 Ind. Cas. 602; 30 M. L. J. 415.
(7) 40 Ind. Cas. 170; 32 M. L. J. 520; 5 L. W. 507.
(8) 62 Ind. Cas. 396; 41 M. L. J. 78; (1921) M. W. N. 243.
(9) 83 Ind. Cas. 196; 46 M. L. J. 314; 34 M. L. T. 142; 47 M. 462; A. I. R. 1924 Mad. 550; 20 L. W. N. 357.
(10) 59 Ind. Cas. 507; 43 M. 869; 12 L. W. 262; (1920) M. W. N. 537; 39 M. L. J. 438.

content not to dissent from the other Judges. In that case, the adjudication was made by the Official Receiver. In *Subba Aiyar* v. *Ramasami Aiyangar* (4) also the petition was for adjudication and for the administration of the estate. The Receiver made the adjudication but no order was made by the District Judge vesting the property in the Receiver. The learned Judges, however, held that the words 'for the administratian of the estate' amounted to appointing the Official Receiver an agent of the Court. Whether that case was correctly decided or not, in the present case the petition was merely referred to the Official Receiver for disposal, that is, for adjudication or not as the case may be. It cannot be held that the disposal of an application for adjudication involves the administration of the estate by the Receiver especially when the Receiver cannot deal with the estate until a vesting order has been made. The decision in *Subba Aiyar* v. *Ramasami Aiyangar* (4) was distinguished in *Kavali Sankaram Rao* v. *Turlapati Ramakrishnayya* (5) in which the order was exactly the same as in the present case and it was held that the transfer of the petition for disposal cannot be construed as in *Subba Aiyar* v. *Ramasami Aiyangar* (4). In the case in *Sankaranarayanam Pillai* v. *Rajamani* (9) the Court itself made the order of adjudication and then passed the order "referred for further proceedings" and the learned Judges construed this to mean that the Official Receiver of the District should act as Receiver in the particular case and the matter was referred to him, and, therefore, the order amounts to an order of appointment. Venkatasubba Rao, J., was also of the opinion that the Official Receiver may be regarded as having been constituted as agent of the Court as in *Subba Aiyar* v. *Ramasami Aiyangar* (4).

It seems to me that the reasoning in *Sankaranarayanam Pillai* v. *Rajamani* (9) does not help us in the present case as the order of reference to the Official Receiver was not made after the adjudication but the reference itself was for the purpose of adjudication. We cannot imply by the mere use of the word 'disposal' that it was intended to appoint the Official Receiver as the agent of the Court. Nor did the Official Receiver purport to act as the agent of the Court. The result is that the line of reasoning based upon the agency of the Receiver does not avail in this case. Mr. Varadachariar for the respondent contended that the Court itself can rectify the defect in the original order by the later order it passed on 1st February, 1921, long after the sales and after the trial of this suit and eight days before the judgment of the District Munsif. He relies on *Mahomad Kala Mea* v. *Harperink* (11). I cannot think that case while showing that a Court may correct its own irregularities in some cases supports the proposition that an order made on 1st February, 1921, can date back and validate sales made in 1918. For this purpose the only argument that can be urged is by relying on s. 43 of the Transfer of Property Act. In my opinion it may be said in this case that the Official Receiver erroneously represented to the purchasers that he was authorised to transfer the properties in the suit. There is no doubt that he also professed to transfer the properties for consideration. I also think that sales by Official Receiver will be covered by s. 43 and will not fall under the exemption clause s. 2 (*d*) which relates to transfers by operation of law, and transfers by a decree or order and transfers in execution of a decree or order. The only obstacle that remains in the way of the respondent is whether the words "any interest which the transferor may acquire in such property" in s. 43 will cover the right of a Hindu father to sell the whole joint family property which vests in the Official Assignee according to our judgment in *Balavenkataseetharama Chettiar* v. *Official Receiver, Tanjore* (3). I think the words "any interest in such property" are wide enough to cover the right of a Hindu father to sell the whole of the joint family property and are, if at all, wider than the word "property" in s. 2 (*d*) of the Provincial Insolvency Act, which according to our construction, will include such power. On this last ground I am, therefore, inclined to hold, agreeing with Devadoss, J., that the appeal must be dismissed with costs.

Venkatasubba Rao, J.—It has been held by a Full Bench of this Court in *Balavenkataseetharama Chettiar* v. *Official Receiver, Tanjore* (3) that the conditional power of a Hindu father to dispose of his sons' interest vests in the Official Receiver, and that decision governs the

(11) 1 Ind. Cas. 122; 36 C. 323; 13 C. W. N. 249; 6 A. L. J. 31; 5 M. L. T. 126; 9 C. L. J. 165; 11 Bom. L. R. 227; 19 M. L. J. 115; 36 I. A. 32 (P. C.).

present case so far as this point is concerned.

A further contention has in this appeal been raised that the sales by the Official Receiver are bad by reason of the fact that when he effects the sales there was no order in virtue of which the property vested in him. The following dates are material. The 2nd defendant applied to be adjudicated insolvent on the 24th January, 1918. His petition was forwarded for disposal to the Official Receiver on 31st January, 1918. The Receiver adjudicated him insolvent on 15th July, 1918. The properties were sold by auction on 25th August, 1918, and sale-deeds were executed by the Receiver in favour of defendants Nos. 3 to 5 on 12th September, 1919. The vesting order was made by the Court on 1st February, 1921.

This case has to be decided with reference to the Provincial Insolvency Act (III of 1907). Under s. 18 (1) the Court may at the time of the adjudication or at any time thereafter appoint a Receiver for the insolvent's property and thereupon such property vests in the Receiver. There being no order appointing a Receiver, the question of vesting in a Receiver cannot arise. When the order of the 31st January, 1918, was made the insolvent had not been adjudicated and the Court could not, therefore, then appoint a Receiver for the property of the insolvent. The order of the 31st January cannot accordingly be construed as appointing the Official Receiver by implication Receiver of the insolvent's property. Then, can it be said, as has been contended by Mr. Varadachari, that the Official Receiver was the agent of the Court for the sale of the property? I do not think that on the facts of the present case, the theory of agency can be upheld. Under s. 16 (*z*) (*a*) on the making of an order of adjudication, if the insolvent's property does not vest in the Receiver it vests in the Court. On 31st January, 1918, when the petition was forwarded to the Official Receiver an order of adjudication had not been made and the property, therefore, did not vest in the Court, and it is thus difficult to accept the argument that the Official Receiver was intended to be constituted the Court's agent for the sale of the property. Moreover, the words of the order 'forwarded to the Official Receiver for disposal' clearly show that the functions which the Official Receiver was to exercise were delegated judicial functions under s. 52 and have no reference to the administration under s. 20 of the insolvent estate. For these reasons, *Sankaranarayanam Pillai* v. *Rajamani* (9) and *Subba Aiyar* v. *Ramasami Aiyangar* (4) do not apply to the facts of the present case. It was next suggested that the Court by making the vesting order, dated 1st February, 1921, should be deemed to have ratified the unauthorised sales. The question of ratification does not arise as the Official Receiver did not purport to act on behalf of the Court. The contention of Mr. Varadachari based on the ground of agency thus fails.

It is next contended, that although the transfer was inoperative at the outset, it afterwards became operative under s. 43 of the Transfer of Property Act.

It runs thus:—"Where a person erroneously represents that he is authorised to transfer certain immoveable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists."

"Nothing in this section shall impair the right of transferees in good faith for consideration without notice of the existence of the said option."

When the Official Receiver sold the properties in 1919 he had no interest in them and was, therefore, not competent to convey them; but in virtue of the vesting order, dated 1st February, 1921, he acquired an interest and the transfer operates under s. 43 on that interest without any further act on the transferor's part. This is the contention and, in my opinion it seems to be sound and must be accepted. The section embodies a rule of equity that when a transferor purports to convey a property to which he has no title, the transferee must be satisfied out of any title which the transferor may afterwards acquire in the same property. All the requirements of the section are here fulfilled. There was an erroneous representation by the Official Receiver that he was authorised to transfer the property. There was no order appointing him a Receiver and the property had not vested in him. Believing he had the right to deal with it he conveyed the property. The representation was, of course, not express, but express representation is not necessary under the law. Representa-

tion of ownership was implied in the very act of transferring the property and such an implied representation is sufficient for the purposes of the section. [*Angannayya* v. *Daroor Narasinna* (12), and Shephard and Brown's Transfer of Property Act Commentaries to s. 43] It was next contended that s. 43 does not apply, because the preamble to the Transfer of Property Act states that the object of enacting it was to define and amend the law relating to the transfer of property by act of parties and it is suggested that the act of the Official Receiver does not fall within the description of "act of parties". I find this to be a fallacious argument. The expression "by act of parties" connotes that the scope of the Act is limited to voluntary transfers as distinguished from transfers by operation of law. When the property vests in a Receiver on insolvency, there is a transfer by operation of law but when a Receiver transfers the property to an alienee, the alienation is a voluntary transfer and is as much an "act of parties" as any transfer by a private individual. Section 2 (*d*) of the Transfer of Property Act is next relied on as furnishing an argument against the application of s. 43. The material portion of s. 2 (*d*) reads thus:—

"But nothing herein contained shall be deemed to affect any transfer by operation of law or by, or in execution of, a decree or order of a Court of competent jurisdiction."

This provision makes it clear that transfers by operation of law do not come within the scope of the Act, but, as I have said, the sales in question are not such transfers.

It is next obvious that these sales are not transfers in execution of a decree or order of a Court of competent jurisdiction. There remains the only other part of the section. Are these sales transfers by a decree or order of a Court? It is impossible to regard these as such. There is, in the present case, no decree or order which may be said to have the effect of transferring these properties. Section 2 (*d*) does not stand in the way. Next, it is said that the section does not apply to sales forbidden by law on the ground of public policy. This is not such a sale and this argument is equally untenable. It is lastly contended that s. 43 does not prevent the insolvent's sons from attacking the sale. I am unable to follow this argument. The section refers to transfer of immoveable property. What the Receiver transferred was undoubtedly immoveable property. In so transferring immoveable property he exercised the Hindu father's power to dispose of his son's shares. The question is, what is that that he transferred? Whether in his capacity as the assignee of the insolvent or as exercising the insolvent's power of disposal, what the Receiver actually did was to transfer immoveable property. That is all that the section requires and I do not see how if the Receiver is bound by the transfer, the sons are not. I may take an illustration for showing how misleading the argument of the learned Vakil for the insolvent's son is. Let us take a simple case of the father himself transferring the property. Let us assume that the father acquires a property by purchase as joint family property. Soon after its acquisition the father sells it for justifiable purposes. It is subsequently found that on the date of the transfer by the father, his title was defective as he had not taken, say, a release from some party with an outstanding title. When the defect is discovered it is cured by the father taking the necessary release deed. Can it be said that the sons in this case can take advantage of their father's defect of title and contend that the property has not passed to the transferee? Similar instances may be given of cases of ward and guardian or beneficiary and trustee. In these cases it is impossible to uphold the contention that while the law forbids the actual transferor to rely upon his own defect of title, a third party for whom the transferor acts can, however, defeat this equitable rule and commit a fraud. I am clearly of the opinion that s. 43 applies and I, therefore, accept the contention based on that section.

Another point has been urged by Mr. Varadachariar, namely, that the Court is bound to set right its own mistake and for this he relies upon the very strong observations of Lord Macnaghten in *Mahomed Kala Mea* v. *Harperink* (11). I am not prepared to say that this contention is unsound, but I refrain from expressing any opinion at present on that point.

The appeal fails and is dismissed with costs.

Letters Patent Appeal No. 126 of 1924 follows.

Curgenven, J.—I agree that the order

(12) 18 M. L. J. 247; 3 M. L. T. 243.

of 31st January, 1918, was not a vesting order, if only for the reason that under s. 56 of the Provincial Insolvency Act the Court cannot pass such an order before the order of adjudication is passed.

Three separate lines of argument have been employed to support the position that the Court can validate its Official Receiver's sale by passing a subsequent vesting order. The first is that if the property does not vest in the Receiver it vests in the Court, and, the Receiver, being an Officer of the Court we may regard Court and Receiver as one, and an act done by either as done by that single agency. The second argument would make the Receiver the Court's agent, thus enabling the Court to ratify an act under s. 196 of the Indian Contract Act. The third argument is based on s. 43 of the Transfer of Property Act.

I do not think it necessary to discuss the merits of the first and second arguments, because it appears to me clear that the case may be brought under s. 43 of the Transfer of Property Act. That section is a branch of the Law of Estoppel, and the first requisite is that the transferee should have been misled into the impression that his transferor had title to transfer. It appears to me that where an Official Receiver sells the property of an insolvent, it may be presumed without more that a purchaser erroneously believed him to have authority to do so, and it is not necessary in order that such purchaser may be protected under s. 43 that he should have instituted any further inquiries. The section itself contains nothing which would make it inapplicable to a sale by a public servant, but reliance has been placed on the terms of s. 2 (*d*) and, should any ambiguity be found therein, of the preamble. Section 2 (*d*) provides that nothing contained in the Act shall be deemed to affect "any transfer by operation of law or by, or in execution of, a decree or order of a Court of competent jurisdiction....." No difficulty seems to be presented by the words "transfer by operation of law" which, however widely they may be construed, cannot cover a sale by a Receiver of an insolvent's property. Such a sale is frequently a matter of discretion and so a voluntary act on the part of the Receiver, as the purchase is on the part of the buyer, and, although the Receiver may be a public officer, the transaction is not the less an act of parties on that account. The ordinary rules relating to stamps and registration apply to such sales.

The next phrase to be considered is "by a decree or order of a Court of competent jurisdiction." It would, I think, be a misuse of language to say that a sale was by order of the Court for the mere reason that the Court had passed a vesting order in respect of the whole assets. An Official Receiver is not required to obtain the Court's sanction before selling any portion of the property, nor is such sale subject to the Court's confirmation. There is an Allahabad case *Gaya Prasad* v. *Baij Nath* (1), in which the question was raised but not decided, whether a sale by the Official Liquidator, in the process of winding up a company, fell within s. 2 (*d*) of the Transfer of Property Act, but since the learned Judges observe that without the order sanctioning the sale the defendant would have got no title from the Official Liquidator, I infer that there was a specific order of Court sanctioning that particular sale. If that was so, the argument for excluding such a sale from the provisions of the Act would be stronger than where only a general vesting order has been passed. Nevertheless, enough doubt was felt for the Bench to add the advice that Official Liquidators who take leases and subsequently as such liquidators sell the interest of the lessee had better, for their own protection and to avoid any question of their continuing liability, execute in favour of the purchasers written assignments of the leases and see that they are registered. In other words, they should observe the formalities required for a transfer by act of parties.

There remains to be considered the effect of the words "in execution of a decree or order of a Court of competent jurisdiction," and it would, I think, be unduly extending the meaning of these words to hold that a sale of property vested in the Official Receiver by order of the Court is in execution of that order. In one sense, no doubt the sale is in pursuance of or "in execution of" the order, since such an order has ordinarily in contemplation a realisation of assets by sale. But attaching to "execution" the meaning which it bears in relation of judicial proceedings, I conclude that such a sale falls outside the scope of the exception. I agree, therefore, that the appeals must be dismissed with costs.

V. N. V. *Appeals dismissed.*

OUDH CHIEF COURT.

SECOND CIVIL APPEAL No. 466 OF 1925.

November 24, 1926.

Present:—Mr. Justice Misra and Mr Justice Raza.

GAJADHAR LAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

MAKHAN LAL—PLAINTIFF—RESPONDENT.

Hindu law—Alienation by widow—Consent of reversioners—Reversioner joining sale-deed, effect of—Consent of whole body of reversioners, necessity of.

A person who deals with a Hindu widow or a Hindu mother having a limited estate, is bound to establish the facts which justify the transaction under which he claims. [p. 18, col. 1.]

Alienation by a Hindu widow, without proof either of legal necessity or of reasonable enquiry and honest belief as to its existence, but with the consent of the next reversioner or reversioners for the time being may be valid and binding on the actual reversioner, if the presumption of legal necessity or of reasonable enquiry and honest belief raised by such consent is not rebutted by more cogent proof. But the mere fact that one of the reversioners was a party to a sale-deed is not sufficient proof of his consent to the sale, where he joined the sale-deed merely because his own property was also sold thereunder. [*ibid.*]

In order that an alienation by a widow may be supported on the ground of consent of the next reversioners, ordinarily the consent of the whole body of persons constituting the next reversion should be obtained, though there may be cases in which special circumstances may render the strict enforcement of this rule impossible. [*ibid.*]

Bajrangi Singh v. *Manokarnika Bakhsh Singh* (1), relied on.

Appeal against a judgment and decree of the Third Additional District Judge, Lucknow at Sitapur, dated the 1st May, 1925, setting aside that of the Subordinate Judge, Kheri, dated the 26th August, 1922.

Mr. *K. P. Misra*, for the Appellants.

Mr. *Naimullah*, for the Respondent.

JUDGMENT.—This is a defendants' appeal arising out of a declaratory suit.

The circumstances out of which this suit has arisen, so far as they are material to the judgment, may be very shortly stated:—

Musammat Ganesha, *Musammat* Batasho and Hira Lal executed a sale deed in favour of Gajadhar Lal and Suraj Prasad (defendants Nos 1 and 2), in respect of certain *zemindari* shares in villages Chittapur and Behra Moti, in the District of Kheri, for an ostensible consideration of Rs. 1,596 on the 7th of March, 1911. Excepting the two items of Rs 40 and Rs. 50 said to have been paid in cash at the time of the execution of the sale-deed, the rest of the consideration was made up of some previous loans or pre-existing debts due to the defendants Nos. 1 and 2 or made payable to some other persons. The shares transferred by the three executants were separately specified in the deed.

In the present suit we are concerned only with the property which originally belonged to Chhabba Maha Brahman, husband of *Musammat* Ganesha, and which she inherited from her sons Sheo Prasad and Girwar, who died issueless sometime after the death of their father Chhabba. Makhan Lal and his brother, Hira Lal (one of the three executants to the sale-deed in question) are, admittedly, the next reversioners of Sheo Prasad and Girwar.

Makhan Lal brought the present suit for a declaration that the sale of the share of Sheo Prasad and Girwar made by *Musammat* Ganesha was not made for any legal necessity and was not, therefore, binding on him after her death.

The claim was resisted by the defendants Nos. 1 and 2 and some other defendants.

The suit was dismissed by the learned Subordinate Judge of Kheri on the finding that the bulk of the consideration money (*i.e.* Rs. 600) was taken by *Musammat* Ganesha for legal necessity.

The plaintiffs' appeal was, however, allowed by the learned Additional District Judge, who decreed the claim on the findings (1) that the alleged pre-existing debts, in consideration of which the sale in question was made by *Musammat* Ganesha, had not been incurred for any legal necessity, (2) that no inquiries were also ever made by the creditors as to the existence of such necessity, and (3) that it was not also satisfactorily proved that the plaintiff and his brother, Hira Lal, had consented to the sale in question.

The contesting defendants have now come to this Court in second appeal.

We think there is no substance in this appeal, which is really concluded by findings of facts.

The appellants' learned Counsel has attempted to show that the finding of the learned Additional District Judge as to the absence of legal necessity, is erroneous and should not be accepted by this Court. We are not prepared to agree with him on that point. We have carefully examined the detail of the pre-existing debts in question and the evidence on record and we agree with the learned Additional Judge

that there is no reliable evidence on record to show that there was really any legal necessity for contracting the debts in question.

A person who deals with a Hindu widow or a Hindu mother, having a limited estate, is bound to establish the facts which justify the transaction under which he claims. The contesting defendants in this case have failed to establish such facts and the learned Additional Judge was perfectly right in holding that no legal necessity for the transaction in question was made out. Alienation by a Hindu widow or a Hindu mother without proof, either of legal necessity or of reasonable inquiry and honest belief as to its existence but with the consent of the next reversioner or reversioners for the time being, may be valid and binding on the actual reversioner, if the presumption of legal necessity or of reasonable inquiry and honest belief raised by such consent is not rebutted by more cogent proof. But in this case the defendants have failed to establish that the plaintiff and his brother Hira Lal, had consented to the sale in question. It is true that the plaintiff's brother, Hiralal, was one of the executants of the sale-deed in question, but there is no sufficient proof of the fact that he had really consented to, or admitted the validity of the sale of the share in dispute by *Musammat* Ganesha. He joined in the sale transaction merely because he had also transferred some of his own property under the sale-deed. There is nothing in the deed to show that Hira Lal had given his consent to the sale of the share in dispute by *Musammat* Ganesha. It had also been found that the plaintiff was not even present at the sale. The presence of Hira Lal cannot affect the plaintiff's rights anyhow. The plaintiff was as much interested in the reversionary rights as his brother Hira Lal. As pointed out by their Lordships of the Privy Council in the case of *Bajrangi Singh* v. *Manokarnika Bakhsh Singh* (1) "ordinarily the consent of the whole body of persons constituting the next reversion should be obtained, although there may be cases in which special circumstances may render the strict enforcement of this rule impossible." In the case of *Ghisiawan Pande* v. *Raj Kumari* (2) where it was found as a fact upon the evidence that a transfer of her husband's property made by a Hindu widow was not a transfer for valid legal necessity, it was held that the fact that the next reversioner had joined the widow in making the transfer, did not render it valid and binding even as against the remoter reversioners. The ruling of their Lordships of the Privy Council in the case of *Rangasami Goundan* v. *Nachiappa Goundan* (3) shows that the consent of such *reversioners* as might fairly be expected to be interested to quarrel with the transaction will be held to afford a presumptive proof which, if not rebutted by contrary proof, will validate the transaction as a right and proper one. There are no special circumstances which might render the strict enforcement of the rule impossible in this case.

We think the learned Additional District Judge was perfectly right in holding in this case that the plaintiff is entitled to the declaration asked for. No case has been made out to disturb the judgment of the learned Additional District Judge. Hence we dismiss the appeal with costs. The decree of the lower Appellate Court is confirmed in all respects.

A. N. A. *Appeal dismissed.*

(1) 35 I. A. 1; 12 C. W. N. 74; 9 Bom. L. R. 1348; 6 C. L. J. 766; 3 M. L. T. 1; 5 A. L. J. 1; 30 A. 1; 17 M. L. J. 605; 11 O. C. 78 (P. C.).

(2) 63 Ind. Cas. 556; 43 A. 534; 19 A. L. J. 476.

(3) 50 Ind. Cas. 498; 42 M. 523; 36 M. L. J. 493; 17 A. L. J. 536; 29 C. L. J. 539; 21 Bom. L. R. 640; 23 C. W. N. 777; (1919) M. W. N. 262; 26 M. L. T. 5; 10 L. W. 105; 46 I. A. 72; 1 U. P. L. R. (P. C.) 66 (P. C.).

MADRAS HIGH COURT.

IN THE MATTER OF THE INDIAN SPECIFIC RELIEF ACT, SECTION 45 AND IN THE MATTER OF THE CITY MUNICIPAL ACT.

October 7, 1926.

Present:—Mr. Justice Srinivasa Ayyangar.

T. EKAMBARA NAICKER AND ANOTHER—PETITIONERS

versus

THE COMMISSIONER OF THE MADRAS CORPORATION—RESPONDENT.

Specific Relief Act (I of 1877), s. 45—Mandamus, *writ of, power to issue—Madras City Municipal Act (IV of 1919), s. 55 (2)—Rules for conduct of elections, rr. 2 to 6—Provision in s. 55 for holding election in August or September, whether directory or mandatory—Government, power of, to direct elections after September—R. 5, scope of—Power, whether confined to fixing only one date—R 6, operation of, whether can be dispensed with—Three days' interval whether obligatory in all cases—Government of India Act, 1919,* (9 & 10

Geo. V, c. 101); ss. 46, 49—Repealing and Amending Act (XXXI of 1920), Sch. I—General Clauses Act (X of 1897), s. 31—Notification—Presumption as to validity—Notification by order of Government, whether can be treated as one by Governor acting with Ministers—Evidence Act (I of 1872), s. 78—Proof of Government notification.

The direction contained in s. 55 (2) of the Madras City Municipal Act that in cases of vacancies arising by efflux of time in the office of Divisional Councillor, the Commissioner should fix a date for election in the months of August and September is merely directory and not mandatory. Even if the direction can be regarded as mandatory, it would only indicate that the power of the Commissioner to fix a date is limited to the months of August and September. The power of the Governor-in-Council under the rules to fix fresh dates for the holding of an election is not affected thereby. [p. 22, col. 1.]

The power of the Governor-in-Council to fix a date for election under r. 5 of the Rules for the conduct of elections under the Act is not confined to the sole contingency of the decision of the Commissioner or Chief Judge, Small Cause Court, being given within 3 days of the date fixed for an election. It provides for the exercise of the power recognised to exist in the Governor-in-Council on any one of the occasions on which such exercise may become necessary. Therefore, under r. 5 of the Rules, it is competent to the Governor-in-Council to issue a notification fixing fresh dates from time to time as often as occasion requires, dispensing in special cases with the procedure laid down in rr. 2, 3 and 4 relating to fresh nominations. [p. 22, col. 2.]

Rule 6, however, which requires 3 days' notice being given of all elections cannot be so dispensed with and must be observed in all cases. [p. 23, col. 1.]

Rule 6 clearly contemplates the date of the election being fixed at the time when the Schedule of candidates is published, and the clear and indisputable object of the rule is to give notice of the date of the election and the names and other details with regard to the candidates for the election. [p. 23, col. 2.]

A notification for the holding of an election without the 3 days' interval contemplated by r. 6 is illegal and ineffective. [*ibid.*]

There is no warrant for the Legislature having intended any distinction between the substantive rights and procedure as indicated in rr. 2, 3 and 4. The word 'repeat' in r. 5 clearly indicates that where rr. 2 to 4 are dispensed with, the entire process of nominations, etc., need not be gone through again and that the election may be held taking it up at the point at which its further progress became checked. In such a case, however, the process indicated in r. 1 need not be repeated. The scheme indicated in r. 5 is only to proceed from the stage at which r. 2 commences, namely, the stage of nomination of candidates with regard to the particular election and then proceed, with the further provision that even this step might be dispensed with by special order. [p. 24, col. 2; p. 25, col. 1.]

By virtue of r. 5 unless the Governor-in-Council should by special order otherwise direct, the procedure prescribed in rr. 2, 3 and 4 should be repeated. The burden of establishing that there has been a direction to the contrary by properly constituted authority is on the person who claims exemption from the normal operation of the provisions of r. 5. [p. 25, col. 2.]

The reference to the "Governor-in-Council" in the Madras City Municipal Act cannot, in consonance with the general intent, be regarded as anything other than a reference to the Executive Government. After the Government of India Act of 1919, when the whole subject of local Self Government has become transferred from the Governor-in-Council to the Governor with the Ministers, the expression "Governor-in-Council" in the Act should by virtue of the provisions of Act XXXI of 1920 now be read as the Governor acting with Ministers as provided in s. 46 of the Government of India Act, 1919. [p. 27, col. 1.]

According to the provisions contained in cl. 1 of s. 49 of the Government of India Act of 1919 it is only when an order or proceeding is authenticated in the manner referred to, that the order or proceeding cannot be called into question in a Court of Law. [p. 27, col. 2.]

Section 78 (1) of the Evidence Act applies only to proof of documents, or, in other words, it is only a provision for the notification being proved by the production of a copy of the Gazette and cannot prove that the authority promulgating a notification was the Governor with the Ministers when the notification does not purport to say so. [*ibid.*]

When certain powers are given by Statute to the Governor acting with the Ministers one of two things must be clearly established, either that the power was as a matter of fact exercised only by the Governor with the Ministers, or else that the power is notified as having been so exercised as to make it incapable of being called into question. [p. 28, col. 1.]

Rule 5 contemplates not merely the fixing of a date but also the exercise of an important judgment with regard to the dispensing with rr. 2, 3 and 4 and the requirement of the rule that the dispensing with shall be by the special order of the Governor with the Ministers must be strictly carried out. It is not a power that can be delegated or that can be exercised under any departmental rules by any persons other than the persons constituted as the proper authority. [p. 28, col. 2.]

An order, therefore, purporting to be issued by the order of the Government, Ministry of Local Self-Government cannot be treated as one issued under the authority of the Governor-in-Council acting with Ministers and is, therefore, not in accordance with law. [*ibid.*]

The right to nominate a candidate is undoubtedly part of the franchise and a denial of that right does constitute a denial of the franchise. Where that right is denied, a remedy by suit after the election is held, cannot be regarded as an adequate remedy. [p. 29, col. 1.]

Although by s. 50 of the Specific Relief Act the writ of *mandamus* has been abolished, s. 45 has codified the law with regard thereto and the High Court has power under the section to issue orders against public officers for enforcement of public duties. [p. 20, col. 2.]

Appeal to the High Court, Original Side, under s. 45, Specific Relief Act.

Mr. *N. Chandrasekara Iyer*, for the Petitioners.

Mr. *S. Rangasami Iyengar*, for the Respondent.

JUDGMENT.—Late in the afternoo of Wednesday last weak the 29th Septem

ber Mr. Alladi Krishnaswami Iyer presented this petition urgently and moved for a rule *nisi*.

The application is by two voters in the Municipal Electorate of the Royapetta or the 29th Division of Madras City and is for a mandatory order under s. 45 of the Specific Relief Act against the Commissioner of the City Corporation restraining him from holding the election of the Divisional Councillor for that Division otherwise than in conformity with the rules relating thereto.

It was stated that the election had been announced to be held on the following day the 30th September and the application was moved and argued *ex parte* for an order *nisi*.

Having regard to the short time within which I had to make up my mind and the late stage at which the application was moved and what may be regarded as the serious consequences of stopping an election announced to be held on the following day, I should have been disposed to refuse an *interim* order, had I not had *prima facie* grounds to satisfy myself that some of the questions raised were of such importance that even the consequences of the stopping of the election would not comparatively be by any means serious. It was thereupon that I issued an order *nisi* and made it returnable on the following morning to be heard as the very first motion in the list.

The order *nisi* issued by me was in terms merely restraining the Commissioner from holding the election until further orders of the Court and it was so made expressly for the purpose of enabling the Commissioner to hold the election on the 30th itself if in the course of the day I should come to the conclusion that the Rule should not be made absolute and should be discharged. But as it was, neither side was able to finish the argument on that day and Mr. Rangasami Iyengar the learned Vakil for the respondent also intimated to me that there was no idea of holding the election that day in any case. The matter has now been argued at great length on both sides by Mr. N. Chandrasekara Iyer for the applicants raising every possible contention and with great ingenuity and astuteness and by Mr. S. Rangasami Iyengar for the respondent the Commissioner of the Corporation with great strenuousness, and considerable learning, and research raising as it seemed to me every point that could possibly be urged in the matter. And I have also taken time for a consideretion of two or three of the many questions that have been raised and argued on both sides, because though in respect of most of the matters I had no difficulty in arriving at conclusions as the discussion proceeded and closed, still with regard to some of the matters I have felt great difficulty in coming to a satisfactory determination.

I may also add that having regard to all the circumstances I have deemed it desirable to pronounce my judgment in the case as early as possible.

An objection, in its nature preliminary was raised to the sustainability of the application itself on the ground that in the notice of motion, the writ applied for, is, for what is called a *mandamus* and that under s 50 of the Specific Relief Act the power of the High Courts has been taken away to issue any writ of *mandamus*. Though I cannot say that the learned Vakil for the respondent was not entitled to take the objection, it cannot possibly be regarded as of any substance because the application is expressly entitled in the matter of s. 45 of the Indian Specific Relief Act, and it is well known that in spite of the abolition by s. 50 of the writ of *mandamus* the profession and the public alike have still continued to refer to an order under s. 45 as a *mandamus* because, as it may well be, of s. 45 having merely codified the law with regard thereto.

I had, therefore, no hesitation in rejecting such a preliminary objection which could not be regarded as an objection even to the form of the application.

For a proper appreciation of the contentions raised respectively on both sides, it will be useful at this stage briefly to recapitulate the events and proceedings which ultimately culminated in the present petition.

One O. A. O. K. Lakshmanan Chetty was one of two candidates nominated for election as the Divisional Councillor for the 29th for the Royapetta Division of the City. The last day for the nominations being made was the 17th August, 1926. It would appear that this Lakshmanan Chetty having been an Honorary Presidency Magistrate of the City and apparently with a view to obviate any objection to his nomination for election having regard to the terms of s. 52 cl. 1 (*b*) (4) of the Madras City Municipal Act

which disqualifies a Presidency Magistrate for election as a Councillor, sent in his resignation as the Honorary Presidency Magistrate on or about 11th August, but that the notification of the Government accepting his resignation did not appear till the 19th of August, that is to say, two days after the date fixed for the nomination of the candidates for the Division. On the ground, therefore, that the said Lakshmanan Chetty was at the date of the nomination a Presidency Magistrate, an objection to his nomination was preferred before the Commissioner of the Corporation purporting to be under r. 4 of the Rules framed for the nomination of candidates and for the conduct of divisional elections. The Commissioner upheld the objection and disallowed the candidature of Lakshmanan Chetty, and thereupon under the same rule a revision petition was filed before the Chief Judge of the Small Cause Court at Madras and he delivered his decision confirming the decision of the Commissioner, on the 21st of September, 1926.

Thereupon by notification in the Official Gazette dated the 21st of September, 1926, the 25th of September was fixed for holding the election of the Councillor for the Division and in and by that notification the procedure prescribed by rr. 2, 3 and 4 of the said Rules was ordered to be dispensed with.

In the meantime a civil revision petition having been filed to the High Court against the judgment of the Chief Judge of the Small Cause Court, the election announced for the 25th of September was stayed by an injunction of the High Court but was ultimately dissolved by order of the High Court on the 28th of September.

On the same evening another notification was published in the Official Gazette fixing the 30th of September as the date for holding the election. The present application, therefore, came to be made on the 29th of September as stated above.

At this stage it will be convenient to refer to and deal with a point, not exactly a contention, raised in the course of the arguments by the learned Vakil for the respondent. Under s 55 of the Madras City Municipal Act, cl. 2, it is provided that vacancies arising by efflux of time in the office of Divisional Councillor shall be filled at ordinary elections which shall be fixed by the Commissioner to take place on such days in the months of August and September next preceding the vacancies as he thinks fit. On the wording of this clause, it was said the contention would be open that a valid election for the purpose of filling up a vacancy caused by efflux of time could only be held in the months of August and September. It must be admitted that this clause in the section, even like many other sections and clauses in the Act as well as in the Rules, is unhappily worded. It is a matter very much to be regretted that in legislative enactments and rules having the force of law it should not have been possible to attain a higher degree of clearness and precision in the language employed. This only points to the great necessity that there is for a trained body of legislative draftsmen co-operating in the task of legislation, having regard to the conditions and hurry in which legislation is at present carried on in the Legislative Councils of the country. But, however, loosely and incorrectly the clause above referred to is worded, it is impossible to construe it as prescribing as a condition for the validity and legality of an election, that it should be held only in the months of August or September. If such had been the intention of the Legislature, the intention might easily have been clearly indicated, for instance by the addition after the words "filled at ordinary elections" of some such words as "held in the month of August or September" or by enacting a separate clause for the purpose. As it is, the provision is only in the nature of a direction to the Commissioner and even if the direction shall be regarded mandatory, it would only indicate that the power of the Commissioner to fix a date is limited to the months of August and September. By cl. 1 of the same section the noon of the first day of November following is fixed for the purpose of the old term of office ceasing and the term of office of the new Councillor beginning; and in the following section s. 56 provisions are made for the contingency of the vacancy not being filled by election. Under ss. 59 and 347 the Governor-in-Council is authorised to make rules for the purpose of regulating the procedure with regard to elections. Such rules have been framed and while in those rules provision is made for the Governor in-Council fixing fresh dates for the election, there is no provision in them preventing the Government from fixing any date beyond September, that is to say, in the month of October. I should for my part, be inclined to regard the

direction in cl. 2 of s. 55 that the Commissioner should fix a date in the months of August and September merely as directory and not as mandatory. But in any case it is impossible to accept the view that even though the date fixed for the expiry of the old term and the commencement of the new term of office be the 1st of November, there is no power in any person of authority to hold the election in the month of October if for any reason the holding of the election earlier should be prevented or otherwise turn out to be impossible. It seems to be that the Legislature, in fixing the months of August and September as the months during which the Commissioner should hold the election and the 1st of November as the date for the commencement of the new term of office, must have had in contemplation the intervening month of October as a provision for holding any postponed elections even though they did not contempte any postponement beyond 31st October.

I have, therefore, come to the conclusion that there is no force in the view that was put forward that no election could at all be held after the 30th of September. It is because I came to this conclusion at a very early stage in the hearing of the petition, in fact, even when Mr. Alladi Krishnasami Iyer argued the petition *ex parte* for the order *nisi* that I was satisfied that no serious consequences could really flow from the election being prevented to be held on the 30th of September as notified.

I shall now proceed to deal with the various arguments of the learned Vakil for the petitioners but not in the same order in which he presented them. It was contended by him that the present notification to hold the election on the 30th of September was purported to be under r. 5 of the said Rules, that the rule provided only for the Governor-in-Council on the contingency referred to in that rule, namely, of the decision of the Commissioner or the Chief Judge of the Small Cause Court being given within three days of the date for election, and does not provide for the Governor-in-Council exercising any such power on any other contingency or more than once. Such argument has become possible and even plausible because of the very unsatisfactory way in which the rules have been loosely worded. It seems to me that it will not be a proper construction of the rule to hold that the Governor-in-Council is by the rule vested with any power to be exercised only on the happening of a contingency, but the correct view would be to regard the rule as one providing for the exercise in a specific instance by that authority of the undoubted power vested in the authority and recognised by that rule, of fixing a fresh date for the election. It may be doubtful whether the Commissioner himself having once fixed a date for election, is empowered to fix another date without reference to the Governor-in-Council, if for any reason he should deem fit to do so. But it is clear that under r. 5, when the particular contingency referred to therein should happen the Commissioner is required to report the matter to the Governor-in-Council and have a fresh date fixed by them. It is possible that this rule was made specially having reference to the power reserved in the rule for the Governor-in-Council dispensing in special cases with the procedure laid down in rr. 2, 3 and 4, namely, the rules relating to fresh nominations, objections to nominations and the decision on the objections. Having regard, therefore, to the wording of r. 5 I am unable to agree with the contention that the rule merely creates a contingent power in the Governor-in-Council, and I am clearly inclined to the view that the rule merely provides for the exercise of the power recognised to exist in the authority on one of the occasions on which such exercise becomes necessary.

The second part of the contention with regard to the power to publish the notification was that the rule contemplates only one fresh date being fixed by the Governor-in-Council and not a series of fresh dates from time to time or as occasion may require It is impossible also to agree with any such contention. The general principle of interpretation of Statutes requires that in the absence of anything to the contrary in the context or otherwise, a power being given for effectuating a purpose may be exercised not only once but as often as may be necessary for effectuating such purpose. Apart from such general principle altogether, there can be no doubt that in this case the rules framed would have, under cl. (*c*) of s. 348, the same effect as if enacted in the body of the Act itself, and that cl. 13 of the Madras General Clauses Act I of 1891 would empower the authority to exercise the power from time to time as occasion requires.

The next contention on behalf of the applicants that I shall deal with has again reference to the terms of r. 5. The argument was somewhat as follows:—Under r. 5 the Governor-in-Council is empowered to fix a fresh date for election if there should not be three days between the date on which the decision either of the Commissioner or the Chief Judge of the Small Cause Court is given and the date fixed for election. Though the rule does not say so in express terms, the intendment of the rule is perfectly clear that the fresh date to be fixed by the authority should be such as to afford of three days' notice being given; because otherwise it would defeat the very primary purpose of the rule. In this case the notification was on the 28th fixing fresh date for election on the 30th. The election, therefore, notified for the 30th is against the real spirit of r. 5. There is a great deal of force in this contention. But it seems to me that the three days referred to in r. 5 are the three days indicated in r. 6 and not any different period of three days. It strikes me that the framers of the rules intending to provide in r. 6 three days' notice at least for all elections, made by way of anticipation, in r. 6 provision for the date fixed for the election happening to fall less than three days after the decision with regard to the validity of the nominations of candidates. It will, therefore, be proper and conv:nient to deal with this objection also only as part of the objection based on r. 6 with which I now proceed to deal.

It was argued by the learned Vakil for the petitioners that r. 6 is not one of the rules which can be dispensed with under the provisions of r. 5 or in other words, the provision in r. 6 should be observed with regard to all elections, and as that rule, on a proper interpretation, provides for three days' notice being given of all elections the election notified to be held on the 30th without such three days' notice is bad.

It seems to me that there can really be no answer to this objection as regards the election notified on the 30th. Mr. S. Rangasami Iyengar the learned Vakil for the respondent attempted an answer to this objection which I consider to be very ingenious, and in fact at one stage, was even inclined to regard the answer as satisfactory. He argued that what r. 6 requires to be done is that at least three days before the election, the Commissioner should file a schedule of valid nominations of candidates and publish the same in the manner indicated in the rule, that in the present case there was such a publication on the 21st of September with regard to the election notified to be held on the 25th *idem* and that, therefore, the objection was not tenable. Putting in other words, the argument of the respondents Vakil comes to this: that the schedule of nominated candidates may be published at any time before three days fixed for the election and without notifying the date fixed for the election and that so far as the election itself is concerned, it may be held at any time after three days of such publication without any notice to the voters or candidates. No doubt the principal thing to be done, as indicated in the rule, is the publication of the schedule of candidates and on a literal construction of the rule, it may be possible to agree with the contention of the learned Vakil. But I am perfectly satisfied that this is not the true or proper construction and that the adoption of such construction would lead to monstrous and absurd results and could not possibly have been intended by the rule-making authority. The object of the rule is clearly to give notice to the voters and the candidates for the election to be held, and I cannot agree that the rule should be read as though that notice of the election may be given without notifying the date of the election. The expression "three days" refers to a period of time and the proposition 'before' indicates that what follows that word, even though not in itself a point or period of time, is still regarded for the purposes of the rule as an event from which the period should be computed. The rule clearly contemplates the date of the election having been fixed at the time when the schedule of candidates is published, and as I have already observed the clear and indisputable object of the rule is to give notice of the date of the election and the names and other details with regard to the candidates for the election.

If the contention of the learned Vakil for the respondent should be accepted, it comes to this that the Commissioner may on the first of a month publish the schedule of candidates for election as Divisional Councillors for the particular division and may hold the election without at all notifying the date of election to the

voters or candidates or giving only some notice on the previous day. It is impossible to accept a contention that would necessarily lead one to suppose that the rule-making authorities intended any such preposterous result. If this rule should not be construed as providing for notice of the date of the election there is no other rule, providing for such notice, at any rate, in cases where the date of the election is changed. I have, therefore, very little hesitation in repelling this contention put forward on behalf of the respondent.

Though I have thus come to the conclusion that the notification of the 28th of September fixing the election to be held on the 30th was illegal, as being against r. 6 it does not of course necessarily follow that I would be justified in issuing a mandatory order under s. 45 of the Specific Relief Act restraining the holding of the election in this case. If it should be held that there remained on the date of the notification only one valid nomination of a candidate for election and that there was no right or possibility of making any other nominations, it follows that in the absence of any contest the election to be held would only be a merely formal election and the absence of three days' notice of the election, even though illegal, would not be calculated to injure in any manner the rights of any person whatsoever. In this connection I may allude to the argument of Mr. N. Chandrasekara Iyer for the petitioners that a right of franchise included a right to canvass for or against a candidate and that the provision as to three days' notice should be regarded as material even in the case of an uncontested election, because it would enable the voters to go about and see that no one voted for some particular candidate. I am unable to regard a right to canvass for or against a candidate as a special right of a voter and much less as part of the franchise of a voter. If indeed it be a right, it is a right which a voter enjoys perhaps with thousands of others who are non-voters and it is impossible to recognise or give effect to any such right in law. An election being only the process by which the choice is made by the electorate for filling up a vacancy it is the casting of the votes that counts and can be regarded as a legal right. There may, no doubt, be a conceivable case, but merely conceivable where no voter comes to vote for a candidate in an uncontested election, but for the practical purposes of a mandatory order under s. 45 of the Specific Relief Act such contingency may be disregarded.

In the result, therefore, if I should come to the conclusion that there is no force or substance in any of the other contentions with regard to the election notified for the 30th of September I should certainly not be disposed to grant the order simply because there is an illegality in the notice, even though the right in protection of which the order is sought, be absolutely shadowy or merely fanciful.

The next contention of the petitioners' Vakil with which I shall deal is, that under terms of r. 5 the Governor-in-Council can only dispense with or alter the procedure prescribed by rr. 2, 3 and 4 in respect of any election for which a new date is fixed but cannot dispense with or affect the substantive rights of voters in respect of the election. It was argued that an election included nomination, objections to nomination and decision with regard to the objections which are all integral and necessary parts of an election and that in r. 5 it is provided not that rr. 2, 3 and 4 may be dispensed with but that only the procedure prescribed in rr. 2, 3 and 4 need not be repeated. The real intention of the rule-making authority, it was argued, is that in respect of every election for which a date is fixed the process of nominations of candidates, etc., should be gone through and that the Governor-in-Council may by special order only direct that the prescribed forms or the manner of making objections or the authority to decide objections, may all be dispensed with or altered and that the Governor-in-Council has no authority to dispense with nominations altogether. After giving my earnest consideration to the argument very strenuously advanced by the learned Vakil for the applicants on this point, I find it impossible to accede to the contention. There is no warrant for the Legislature having intended any distinction between the substantive rights and procedure as indicated in rr. 2, 3 and 4. The word 'repeat' in r. 5 clearly indicates the true intention of the rule-making authority in the matter. Though nominations may be an integral part of an election still the process by which nominations should be made is regulative of the right and when the Legis-

lature speaks of the process not being repeated, one can only understand it as indicating that the authority may, in its discretion in certain cases, direct that the entire process of nomination, etc., need not be gone through again and that the election may be held taking it up at the point at which its further progress became checked. If the true construction should be as contended for on behalf of the applicants, the result will be that even though the authorities may say that rr. 2, 3 and 4 may be dispensed with, still the voters would have a right of nominating or objecting to nominations or getting a decision with regard to their objections not in the way prescribed in those rules but in any way they please, which to my mind is a result that could possibly not have been contemplated.

There can be no doubt whatever that in the present case the whole trouble appears to have arisen entirely from the manner in which the discretion given in r. 5 to the authorities to dispense with rr. 2, 3 and 4 has been exercised. One would have supposed that if as in the present case the nomination of a candidate had to be rejected because the resignation by him of his office as Honourary Magistrate happened to be accepted two days after the date fixed for the nominations, all principles of justice, equity and good conscience would have pointed to the authorities not dispensing with rr. 2, 3 and 4 thereby disabling the person from being re-nominated but to their so directing the procedure indicated in those rules as to afford facilities for such nomination. But I fail to see what power the Court has to interfere with the exercise by the authorities of the discretion vested in them. It is possible, having regard to the fact that 30th of September was the date fixed, that the authorities felt compelled to dispense with rr. 2 3 and 4 merely because of some apprehension, wrong as it may be, that a valid election could only be held before the end of September. Whatever the real reason may be for the authorities having exercised the discretion in the manner they have purported to do, it seems to me that with regard to such a contention as now under discussion I cannot possibly hold that after the authorities so dispensed with rr. 2, 3 and 4 there is still any right of nomination of candidates or any right in the Court to review the discretion so exercised.

Mr. Chandrasekara Iyer sought to re-inforce his argument about the liability of the respondent to accept fresh or further nominations by pointing out that in r. 5 the procedure prescribed only by rr. 2, 3 and 4 can be dispensed with and that r. 1 can never be so dispensed with. He argued that the term "election" includes every process and step taken with a view to filling up a vacancy and as there is no provision to dispense with r. 1 every time a fresh date for election is fixed under r. 5 the process indicated in r. 1 should be followed. It seems to me impossible to accept such a contention. Excepting the time and place of election, r. 1 has no reference whatever to any process or step with regard to the particular election, and when under r. 5 the date is altered, it is absurd to suppose that the rule-making authority contemplated a repetition of the process indicated in r. 1. The scheme indicated in r 5 is only to proceed from the stage at which r. 2 commences, namely, the stage of nomination of candidates with regard to the particular election and then proceed and there is the further provision that even this step might be dispensed with.

The argument, therefore, that was advanced on behalf of the applicants that though a fresh nomination was tendered the respondent refused to accept the same should not be regarded as an independent argument-independent of the arguments based on the various provisions in the rules.

I have, however, reserved for the last the argument which really was advanced by Mr. Chandrasekara Iyer as the very first one and which gave me the most trouble. It was that the notification under discussion, namely, that of the 28th of September is not a proper or valid notification such as to entitle the respondent thereon to hold the election on the date fixed by the notification and acting on the notification to refuse to receive any fresh nominations. It has already been observed that the said notification purports to dispense with the procedure prescribed in rr. 2, 3 and 4. Rule 5 is explicit on the point that unless the Governor in-Council should by special order otherwise direct, the procedure prescribed in rr. 2, 3 and 4 should be repeated. The burden of establishing that there has been a direction to the contrary by properly constituted authority is on the respondent who has claimed exemption from the

normal operation of the provisions of r. 5. The argument with regard to this point may conveniently be divided under two heads, firstly, the argument with reference to the authority competent to fix fresh dates for election and for the purpose of such election to dispense with rr 2, 3 and 4, and secondly the argument with regard to the proof of the notification having been by such authority. As regards the first point that the expression in r. 5 with regard to the authority to fix a fresh date for election being the Governor-in-Council, it was denied that the notification in question was by the Governor-in-Council, that is to say, by His Excellency the Governor, acting with his Executive Council. It is of course clear from the terms of the notification that it does not purport to be a notification by the Governor-in-Council. Even on the part of the respondent it was not sought to be set up that the notification was in fact by the Governor-in-Council. I state this because of the admission made by the learned Vakil for the respondent before me in spite of the fact that in the affidavit filed by the respondent he has for some inexplicable reason alleged that the fixing of fresh dates on both the occasions, the making of the notifications, the dispensing with rr. 2, 3 and 4 were all only by the Governor-in-Council. When I questioned Mr. Rangaswami Iyengar as to how such allegations came to be made, he answered that the expression was used in the affidavit in order to correspond to the expression used in the rules and merely for the purpose of indicating that the authority was the proper authority. The real contention on behalf of the respondent with regard to this matter was that after the passing of the City Municipal Act and also after the enactment of the rules under consideration the Government of India Act of 1919 came into operation and s. 46 of that Act provided for the transfer of various subjects to be administered by the Governor acting with Ministers and that Local Self-Government being one of the transferred subjects, the authority vested by the City Municipal Act in the Governor-in-Council should be deemed to have been transferred to the Governor acting with his Ministers.

In support of this contention reference was also made to s. 31 included in the General Clauses Act by the Government of India by Act XXXI of 1920. That section runs as follows: "In any enactment made by any authority in British India before the date on which s. 3 of the Government of India Act, 1919, comes into operation, and in any rule, order, notification, scheme, by-law or other document made under or with reference to, any such enactment, any reference by whatever form of words to an authority authorised by law, at the time the enactment was made, to administer Executive Government in any part of British India shall, where a corresponding new authority has been constituted by the Government of India Act, 1919, be construed for all purposes, after the above mentioned date, as a reference to such new authority."

There is no doubt that s. 3 of the Government of India Act, 1919, came into operation in this Presidency only after even the rules under consideration were promulgated and published.

The question then resolves into whether the reference in the City Municipal Act to the Governor-in-Council should be regarded as reference to an authority authorised by law to administer Executive Government in any part of British India, and whether after the introduction of diarchy the ministerialist part of the Government is the corresponding new authority.

The contention on behalf of the applicants appeared to be that the Governor-in-Council was a sort of *persona designata* appointed by the Act for the purpose of exercising the various powers referred to in the rules. If the expression used was the Local Government, then undoubtedly the reference must be regarded as being to an authority authorised by law to administer Executive Government. It cannot of course be denied that the Governor-in Council is such an authority, but when the question is raised whether the reference to the Governor-in-Council is a reference to the body as the Executive Government of the Province at the time, there may no doubt be some room for argument. In other places in the same City Municipal Act the expression "Local Government" is used. But I believe it is for the purpose of covering and comprising all such cases that the language was employed in s 31 of Act XXXI of 1920, that whatever may be the form of words, it is sufficient if the reference is to an authority authorised to administer Executive Government. After carefully consider-

ing the matter, I have come to the conclusion that the reference to the "Governor-in-Council" in the Act could not, in consonance with the general intent, be regarded as anything other than a reference to the Executive Government. There would even then of course remain the further question whether there is anything in s. 31 above cited to show that the powers reserved under the Act to the Governor-in-Council even as Executive Government should be regarded as pertaining to the transferred subjects and transferred to the ministerialist part of the Government. I should have felt great difficulty in determining the question satisfactorily as a matter of legal construction had it not been for the word "corresponding" in s. 31. The reference being to a corresponding new authority full effect can be given to the word "corresponding" only if we should take into consideration the departmental exercise of power and the transfer of such departments. There is also no reason to suppose why when the whole subject of Local Self-Government became transferred from the Governor in-Council to the Governor with the Ministers the power reserved to the Executive Government under an enactment relating to Local Self-Government should not properly be regarded as comprised in the transfer. It seems to me, therefore, clear that the expression Governor in-Council in the City Municipal Act should now be read as the Governor acting with Ministers as provided in s. 46 of the Government of India Act, 1919.

But then there remains the further question whether the present notification has been shown to have been by the Governor acting with the Ministers. Section 49 of the Government of India Act, 1919, cl. 1 provides as follows:—

"All orders and other proceedings of the Government of a Governor's Province shall be expressed to be made by the Government of the Province, and shall be authenticated as the Governor may by rule direct, so, however, that provision shall be made by rule for distinguishing orders and other proceedings relating to transferred subjects from other orders and proceedings. Orders and proceedings authenticated as aforesaid shall not be called into question in any legal proceeding on the ground that they were not duly made by the Government of the Province."

As the authority and validity of the notification was questioned on behalf of the applicants, it became necessary for the respondent to satisfy the Court that the notification was by the proper authority and properly authenticated. No doubt the second clause in the section above cited provides for orders and proceedings not being called into question in legal proceedings, but it is only orders and proceedings authenticated as aforesaid, that is to say, authenticated as set out in the previous clause, namely, as the Governor may by rule direct. No such rules have been produced before me. It is not known whether any such rules have been framed and neither side was in a position to draw my attention to any such rules.

The learned Vakil for the respondent was not in a position to state whether any rule had been passed and if so, what the rule was. According to the provisions contained in cl. 1 of s. 49 above cited it is only when an order or proceeding is authenticated in the manner referred to, the order or proceeding could not be called into question in a Court of Law. I feel, therefore, constrained to hold that the notification in question has not been proved to be so authenticated as required by the said s. 49 as to save it from being called into question. No doubt, if the notification had been properly authenticated and the authentication was to the effect of the notification having been promulgated by the Governor with the Ministers, it would not in the least matter whether, as a matter of fact, the notification was promulgated by the Governor with the Ministers or not. It would have been conclusive and not capable of being questioned in a Court of Law. But not only is there no proof of any proper authentication but even the notification does not purport to have been issued by the Governor with the Ministers. When I questioned the learned Vakil for the respondent with regard to this, he invited my attention to s. 78 of the Evidence Act, cl. 1. That section applies anly to proof of documents or in other words it is only a provision for the notification being proved by the production of the Gazette copy. That section cannot help the respondent in any measure in proving that the authority promulgating the notification was the Governor with the Ministers when even the notification does not purport to say so. The learned Vakil also relied upon an order which he

produced showing that the order under which the notification was published was one issued by order of the Government, Ministry of Local Self-Government. Though I allowed this order to be filed as an exhibit overruling the objection of the applicants' Vakil but subject to argument, it seems to me that the Court cannot look at that order for the purpose of determining whether the notification is as prescribed by the rules. Rule 5 requires that the Governor in Council should fix by notification in the *Fort St. George Gazette* a fresh date, etc.

It follows, therefore, that the notification itself must purport to be by the proper authority. No doubt the letters 'B' and 'N' in the notification may serve to indicate the department of Government to which the notification relates. But even taking the order filed, that purports to be only by order of the Governor, Ministry of Local Self-Government. There is nothing in the order to indicate that it was an order of the Governor with the Ministers as required by the rule as properly construed. When certain powers are given by Statute to the Governor acting with the Ministers one of two things, it seems to me, must be clearly established, either that the power was as a matter of fact, exercised only by the Governor with the Ministers or else that the power is notified as having been so exercised as to make it incapable of being called into question. The Government may in the course of its administration of executive functions delegate many things to subordinate officers. But no such delegation is proper or possible when the right, more especially in the nature of a discretion, is created and given by Statute to a particular body constituted in a particular manner. For aught one can say, the order which purports to be the order of the Government, Ministry of Local Self-Government, might have, after all, been merely the order of the particular Secretary who issued it under his signature and there is nothing even in the order to show that either the Minister himself was the authority issuing the order, or much less the Governor acting with the Ministers by which I must understand all the Ministers. In fact, in a supplemental affidavit filed on behalf of the applicants it was charged that, as a matter of fact, His Excellency the Governor and even the Minister for Local Self-Government could not have been a party to the order, because both of them were absent from Madras on the date and there was between the hour of communication from the respondent the Commissioner and the publication of the notification in the Gazette, no time for an order being issued by the Governor with the Ministers.

There was no attempt made on the part of the respondent to show (even if it could be shown *aliunde* that is to say, apart from the notification itself) that as a matter of fact, the notification was the result of an order made by the Governor with the Ministers.

When it is remembered that r. 5 contemplates not merely the fixing of a date but also the exercise of an important judgment with regard to the dispensing with rr. 2, 3 and 4 it seems to me that the requirement of the rule that the dispensing with shall be by the special order of the Governor with the Ministers must be strictly carried out. It is not a power that can be delegated or that can be exercised under any departmental rules by any persons other than the persons constituted as the proper authority In the case of *Varadarajulu Naidu* v. *Emperor* (1) a Full Bench of this High Court presided over by Sir John Wallis, C. J., held that a sanction required to be accorded by a Local Government should have been the act of the Local Government and not by a single member of such Government.

I have, therefore, come to the conclusion that as the notification in question does not purport to be a notification by the Governor acting with the Ministers and as it is not also shown, as a matter of fact that the Governor with the Ministers even ordered or authorised any such notification, the notification would not be effectual for the purpose of fixing a fresh date for election or for the respondent claiming to hold an election on any such date excluding the operation of rr. 2, 3 and 4. In coming to this conclusion I have had less regret, than I might otherwise have had, because I am satisfied that in the present case and having regard to in the technical reason for which the nomination of O. A. O. K. Lakshmanan Chetty became excluded it is not at all likely that if the proper authorities have had to consider the matter they would

(1) 51 Ind. Cas. 343; (1919) M. W. N. 669; 20 Cr. L. J. 455; 37 M. L. J. 81; 42 M. 885.

have so deliberately excluded the operation of rr. 2, 3 and 4 thereby refusing to that candidate even a fresh opportunity of being nominated.

I have so far dealt with the arguments for the applicants and the answers thereto on behalf of the respondent. There were, however, some contentions put forward on behalf of the respondent which had nothing to do with the arguments for the applicants, but were in form and substance independent arguments, why in the present matter the order applied for should not be made. I do not, however, propose to deal with all of them at any great length but shall content myself with a brief recapitulation of the arguments and a brief statement of my own views thereon. In fact, what the learned Vakil for the respondent did was to take every one of the clauses in s. 45 and try to show that this was not a proper case in which the order should be made. He said that the present case could not be regarded as one of any injury to any franchise. That argument I believe was advanced on the supposition that on the fresh date of election there was to be merely a nominal election as there was only one candidate. There may be so; but if, as I have found, the notification dispensing with rr. 2, 3 and 4 is not effective for the purpose, then it follows that there was no proper date fixed for election and that fresh nominations should also have been received. The right to nominate a candidate is undoubtedly part of the franchise and I fail to see how a denial of that right does not constitute a denial of the franchise.

The respondent's Vakil also argued that there was no breach of duty by the Commissioner. On my findings it is perfectly clear that if the notification was not valid and he purported to act on the strength of that notification there was breach of duty. In any case, the provision in r. 6 is perfectly clear that notice of three days should be given and the omission to give it is a clear omission to do that which was incumbent on him.

It was also attempted to be argued on behalf of the respondent that the petitioners had other adequate and legal remedy such as by suit. I do not propose to discuss this question at any great length. There is a decision, though unreported, by the present Chief Justice to the effect that a mere voter as such has no independent right of suit in such circumstances. But apart from that decision altogether I fail to see how a remedy by suit after the election is held, can be regarded as an adequate remedy. The right of suit which the Vakil for the respondent referred to was a right of suit after the election is allowed to be held and a Councillor is elected and I for my part venture to think that there could be no such right of suit. All the cases referred to by the Vakil for the respondent were suits by the defeated condidates themselves. Mr. Rangasami Iyengar also advanced an argument at one stage that the effect of making an order as applied for will be to contravene other sections of the Act. But my attention has not been drawn to any such sections. The only argument of the learned Vakil for the respondent which pressed me somewhat had reference to the clause in s. 45 of the Specific Relief Act which is to the following effect:—

"Nothing in this section shall be deemed to authorize any High Court—

(*f*) to make any order binding on the Secretary of State for India in Council, on the Governor-General in Council, on the Governor of Madras in Council, on the Governor of Bombay in Council, or on the Governer in Council of Fort William in Bengal."

Mr. Rangasami Iyengar argued that even though the order in this case may only be directed to the Commissioner restraining him from holding the election on a particular date, since the Government has fixed the date, any such order restraining him must be regarded as an order binding on the Government and, therefore, not capable of being passed by the Court. The expression "binding on the Government" is a somewhat curious expression. It is not quite clear that by that expression the Legislature intended anything more than merely orders passed against the Government, following in that respect the English Law. When we speak of an order being passed binding on a person, it can only be because he was a party to the order or else is so otherwise circumstanced as to have obligation cast on him by reason of the order to carry it out. When an order does not purport to be against a party and cannot of its own force oblige any party to do any act or to refrain from doing any act, it cannot be said that the order is binding on such party. So understood, it seems to me, that any

order that the Court may pass restraining the respondent from holding an election on a particular date cannot be said to be binding on the Government; because the Government are under no obligation by reason of the order to do anything or to omit to do anything. If, however, any other construction of the expression should be adopted, it will result in the Court being unable in most matters to make any order against any public servant of Government who may also be under statutory obligations towards the public as in this case to conduct himself in a particular manner. The order, if and when made will only be against the Commissioner requiring him to do an act or refrain from doing an act and it is impossible to see that such an order can be regarded as an order binding on the Government, except in the sense that the Government may have no power to direct the Commissioner to the contrary.

The learned Vakil for the respondent urged in conclusion the usual argument in all such cases, that whatever might be the rights and wrongs of the matter, the Court should not in the exercise of its discretion pass the order applied for. But as I have already observed, there would have been considerable force in such an argument if all that had to be done in the fresh election was only to hold a nominal election uncontested with only one candidate and requiring only a few formal votes to be recorded. As already indicated by me if I had come to such conclusion, I should certainly have been prepared to refuse the order applied for in spite of the fact that according to my view three days' notice of every election was bound to be given under r. 6. But the notification of the 28th of September being in my view not a proper or valid nctification for the purposes of r. 5 and in any case the 30th September having passed, it follows that the Commissioner has no power hereafter either to hold an election on that date or to dispense with the operation of rr. 2, 3 and 4 for the purpose of the election. The provisions in rr. 2, 3 and 4 are substantive provisions and are calculated to affect materially the election in question. I did not understand the learned Vakil for the respondent to contend that even if according to my view there was a right in the voters to make fresh nominations, and the respondent was denying such right, I should still in the exercise of my discretion refuse the order.

The date for fresh election fixed in the notification was the 30th of September. That day is now passed. No question now arises of the election being held without another date being fixed by the proper authority under r. 5. In the view I have taken of r. 6, at least three days' notice of the election should be given as provided therein even in respect of an election for which a fresh date is fixed under r. 5. It will be a matter for the proper authorities hereafter to consider whether having regard to all the circumstances they would make a special order under r. 5 dispensing with rr. 2, 3 and 4 or content themselves with fixing a suitable date so as to allow of the operation of those rules. In view of the fact that the 30th of September the date fixed by the notification referred to for the holding of the election is now unavailable for the purpose there is now no necessity to pass any order with regard to it, and I think the requirements of the case will now be met by my making an order that the respondent be restrained from holding an election on any fresh date without having such date fixed by notification by the proper authorities under r. 5 or without three days' notice of the date fixed for election under r. 6. And I direct accordingly. The respondent will pay the petitioners, the taxed costs of the application.

V. N. V. *Rule made absolute.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1367 OF 1926.

October 22, 1926.

Present :—Mr. Justice Addison.

NIHALA RAM AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

PUNNUN RAM AND OTHERS—DEFENDANTS—RESPONDENTS

Punjab Pre-emption Act (I of 1913), s. 3 (5)—Relinquishment of reversionary right, whether sale—Hindu Law—Widow's estate, nature of—Alienation by widow, validity of—Reversioner's interest in property alienated.

A surrender or relinquishment for consideration by a reversioner of his right to sue to set aside an alienation by a Hindu widow is not a sale for purposes of pre-emption. [p. 31, col. 2.]

Raj Bahadur v. *Jagrup Pande* (2), followed.

Widows in Hindu Law succeed to a limited estate and have dominion over the property which comes to them though this is circumscribed by certain limitations for the protection of the reversioners. An alienation by a Hindu widow is not void but only voidable at the instance of reversioners. [p. 31, col. 2.]

A reversioner does not succeed to property alienated by a widow but has to sue for such property and establish his right to it. A reversioner has thus a right to avoid an alienation made by a widow but he cannot be compelled to exercis this right. [*ibid.*]

Second appeal from a decree of the District Judge, Dera Ghazi Khan, dated the 8th January, 1926, reversing that of the Additional Subordinate Judge, Fourth Class, Dera Ghazi Khan, dated the 25th November, 1925.

Mr. *M. L. Puri*, for the Appellants.

Mr. *J. N. Aggarwal*, for the Respondents.

JUDGMENT.—Paera Ram died leaving two sons, Walu Ram and Parshotam Ram, and two daughters. His sons succeeded to his estate and they were succeeded by their widows, *Musammat* Popati Bai and Thakari Bai. The two widows made a joint mortgage of the land inherited by them in 1886. *Musammat* Popati Bai then died in 1897 and the surviving widow *Musammat* Thakari Bai sold the mortgaged land in 1898 to the mortgagees. *Musammat* Thakari Bai died in 1913. The two daughters of Paera Ram had issue, one of them having three sons, Asa Ram, Nihal Chand and Wasu Ram while the other has a grandson Pokhar Das. Asa Ram and Nihal Chand, two sons of one of the sisters, sued for possession of their share of the land alienated by the widow and obtained a decree for possession of one-third on payment of a specified sum. Wasu Ram, the brother of Asa Ram and Nihal Chand, then sued for possession of his $\frac{1}{6}$th share and also obtained a decree on payment of a particular sum. Pokhar Das, however, the grandson of the other sister, never sued. He transferred whatever rights he had in half of the property in favour of Dharu Ram, son of Asa Ram, who was one of the plaintiffs in the first suit. Therefore, Dharu Ram executed a deed of relinquishment in favour of the vendees on the 4th February, 1924, the consideration being Rs. 370. His uncles Nihal Chand and Wasu Ram then sued for pre-emption of this transfer, which was described as a sale on payment of Rs. 370.

The trial Court decreed the suit but on appeal the learned District Judge held that there was no sale which could be pre-empted and he accordingly dismissed the suit.

The only question in this second appeal is what was the nature of the transaction referred to. Widows in Hindu Law succeed to a limited estate and have dominion over the property which comes to them though this is circumscribed by certain limitations for the protection of the reversioners. An alienation by a Hindu widow is not void but only voidable at the instance of the reversioners, provided that there was no legal necessity. Reversioners do not succeed to the property alienated by a widow but have to sue for such property and establish their right to it. A reversioner has thus the right to avoid an alienation made by a widow but he may never exercise it and cannot be compelled to do so.

In the present case Pokhar Das surrendered or relinquished his right to sue in favour of Dharu Ram and Dharu Ram relinquished his right to sue in favour of the mortgagee vendees. All that Pokhar Das or Dharu Ram was possessed of was this right to sue and in my opinion the relinquishment of that right was not a sale. It would not amount to the transfer of property owned. But for a certain consideration each relinquished his right to sue. It makes no difference that some of the reversioners had sued and had been successful in their suits. Pokhar Das had still to sue, and could not be compelled to sue. He or Dharu Ram had thus never become owner of any part of the property and did not sell any part of the property.

It was held in *Shams-ud-din* v. *Ghulam Hassan* (1) that where a reversioner had obtained a decree subject to payment of a certain sum in a case like the present and sold that decree the transfer did not amount to a sale for the purposes of pre-emption. In the present case a decree even had not been obtained and it does not follow necessarily that a decree would have been obtained, had a suit been filed, while the alienation by the widow remained absolute until challenged. In these circumstances it is not necessary to discuss this question at great length. The deed itself is quite clear and amounts to this that Dharu Ram relinquished his rights in Pokhar Das' right of succession in favour of the widows'

(1) 38 Ind. Cas. 658; 42 P. R. 1917; 51 P. W. R. 1917.

vendees, the consideration being Rs. 370. It cannot be said that this is a sale.

Raj Bahadur v. *Jagrup Pande* (2) is nearly on all fours with the present case. It was held there that where all that a vendor alienated was a right to recover possession of property to which he had a claim that did not give rise to a right of pre-emption.

Abdul Wahid Khan v. *Shalukha Bibi* (3) is also an analogous case. It was held that a transaction very similar to the present was the sale of a share in a law suit.

I have no hesitation in agreeing with the view of the lower Appellate Court and dismiss this appeal with costs.

A N. A. *Appeal dismissed.*

(2) 42 Ind. Cas. 37; 20 O. C. 249; 4 O. L. J. 540.
(3) 21 C. 496; 21 I. A. 26; 6 Sar. P. C. J. 399; Rafique and Jackson's P. C. No. 134; 10 Ind. Dec. (N. S.) 961 (P. C.).

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1088 OF 1923.

February 23, 1926.

Present:—Mr. Justice Odgers.

M. PAZHANIANDI—PLAINTIFF—APPELLANT

versus

T. NAKU AND OTHERS—DEFENDANTS—RESPONDENTS.

C. P. C. (Act V of 1908), O. XVII, r. 3—Non-appearance—Plaintiff present in Court—Adjournment by Vakil refused—Dismissal of suit on merits—Effect.

The words "notwithstanding such default" in O. XVII, r. 3, C. P. C., clearly imply that the Court is to proceed with the disposal of the suit in spite of the default upon such materials as are before it. If in the case of a plaintiff such materials fail to substantiate the claim, the suit will be dismissed for this reason and not for default.

Where a plaintiff is personally present in Court at the time when his Vakil asks for adjournment which is refused, there is no appearance under O. XVII, r. 3.

Second appeal against the decree of the Court of the Subordinate Judge, Ottapalayam, in A. S. No. 14 of 1922, preferred against that of the Court of the District Munsif, Alatur, in O. S. No. 157 of 1921.

Mr. *P. S. Narayanaswami Iyer*, for the Appellant.

Mr. *C. V. Mahadeva Iyer*, for the Respondent.

JUDGMENT.—The point taken in this appeal by Mr. Narayanswami Iyer is that the Subordinate Judge who upheld the decree of the District Munsif was wrong and that the procedure must be taken to have been under O. IX, namely, a dismissal for default on which an application for restoration could be made. There has been no argument on the merits before me and I, therefore, adopt the finding of both the lower Courts that the plaintiff in this case has been guilty of culpable negligence in not taking the steps necessary for the trial of his suit. Now much has been made of the fact that the plaintiff was personally present in Court when he had a Vakil there who applied for an adjournment which was refused. This has rightly been construed not to be an appearance by the plaintiff for the purposes of O. XLI, r. 17, for which Second Appeal No 1734 of 1922 is an authority. The judgment of the Subordinate Judge is undoubtedly a decision on the merits. He finds that the lower Court was right in refusing the adjournment, that it was right in dismissing the suit as there was no evidence on the plaintiff's side to prove his case, that the materials on record did not permit of the granting to the plaintiff of any relief and that the appeal has to be dealt with upon the materials on record only.

In my view the case falls under O. XVII, r. 3 as pointed out by me in *Viswanatha Asari* v. *Sami Asari* (1). It seems to me that in this view the question as to the appearance of the plaintiff is beside the mark. As pointed out by the learned authors of the Civil Procedure Code, Woodroffe and Matthew in their commentary on the section, the words "notwithstanding such default" in the rule clearly imply that the Court is to proceed with the disposal of the suit in spite of the default upon such materials as are before it. If in the case of a plaintiff such materials fail to substantiate the claim, the suit will be dismissed for this reason and not for default. It, therefore, seems to me that the judgment of the lower Appellate Court is perfectly right and the second appeal must be dismissed with costs.

V N. V. *Appeal dismissed.*

(1) 73 Ind. Cas. 982; (1923) M. W. N. 802; 18 L. W. 203; A. I. R. 1924 Mad. 43.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 679 OF 1919.
November 8, 1919.
Present:—Sir Shamsul Huda, KT.,
and Mr. Justice C. C. Ghose.
RAMA NATH BASU CHOWDHURY—
ACCUSED—PETITIONER
versus
SARADA PROSAD BASU CHOWDHURY
AND ANOTHER—OPPOSITE PARTY.

Cr. P. C. (Act V of 1898), s. 147 proviso—'Institution of inquiry', meaning of—Formal order, drawing up of, whether necessary.

The 'institution of an inquiry' within the meaning of s. 147, Cr. P. C., does not refer to the date when the formal proceedings are drawn up under the section.

An inquiry is 'instituted' within three months of the obstruction complained of within the meaning of s. 147, Cr. P. C., where the Magistrate hears the Pleaders of the parties and directs a local inquiry within three months of the date of the obstruction, even though the formal order is drawn up after three months.

Criminal revision against an order of the Deputy Magistrate, Alipur, dated the 8th July, 1919.

Babus *Manmatha Nath Mukerjee* and *Panna Lal Chatterjee*, for the Petitioner.

Babus *Dasarathi Sanyal* and *Hira Lal Chakrabarty*, for the Opposite Party.

JUDGMENT.—The facts of this case are shortly these. The petitioner lodged a complaint before the Sub-Divisional Magistrate of Alipur on the 24th April, 1919, to the effect that there was an *ejmali* privy belonging jointly to himself, to the opposite parties and to certain other co-sharers, and that the opposite parties on the 13th February, 1919, put up a fencing on the passage leading to the privy thereby shutting out the petitioner and the female members of his house from using the said privy. The petitioner prayed that an order under s. 147, Cr. P. C., may be made directing the removal of the obstruction. The Magistrate passed an order calling upon the other side to show cause on the 6th May, 1919. A report was then called for by the Magistrate, which was received by him on the 19th May, 1919, and on perusal of the report he ordered proceedings under s. 147 to be drawn up. On the 16th June, 1919, the Sub-Divisional Magistrate transferred the case to Mr. A. C. Dutt, Deputy Magistrate, for disposal. The case was taken up on the 8th July, 1919, and it was contended on behalf of the opposite parties that a period of three months having elapsed between the date of the erection of the fencing and the institution of the inquiry, the case could not proceed in view of the proviso to s. 147, Cr. P. C. The Magistrate accepted this contention and refused to proceed further.

It has been argued before us that in this case the inquiry was instituted within three months of the obstruction and, therefore, the Magistrate was wrong in holding that the proceedings could not continue. It appears to us that this contention is sound and must prevail.

It seems to us that the inquiry was instituted within the meaning of the proviso at the latest on the 6th May, 1919, when the learned Magistrate heard the Pleaders of the parties and directed a local inquiry by Mr. Ghose. We are not prepared to accede to the argument that the institution of the inquiry meant the date when the formal proceedings were drawn up under the section such an interpretation of the section would make its working difficult and we think the words of the section are wide enough to justify such a conclusion as to which we have come.

That being our view, the order of the Magistrate refusing to proceed with the case must be set aside and he should be directed to proceed under the provisions of s. 147 and dispose of the case on the merits.

A. N. A. *Rule made absolute: Proceedings revived.*

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 301 OF 1926.
(CRIMINAL REVISION PETITION No. 265 OF 1926.)
March 19, 1926.
Present:—Mr. Justice Wallace.
In re N. M. RAMA RAJA—ACCUSED No. 9
—PETITIONER.

Presumptions—Judicial acts—Presumption of regularity—Execution proceedings—Legality of warrant—Burden of proof.

The presumption is that all proceedings taken by a Court in execution are in proper form and if a person challenges the legality of a warrant in execution of a decree, he must advance and prove the facts on which he wishes to rely.

Petition, under ss. 435 and 439 of the Cr. P. C., 1898, praying the High Court to revise the judgment of the Court of the

Sub-Divisional Magistrate, Melur, in Criminal Appeal No. 123 of 1925, preferred against that (of the Court of the Second Class Magistrate, Dindigul.

Mr. *N. Rajagopalan*, for the Petitioner.

ORDER.—The presumption is that all proceedings taken by the Court in execution are in proper form and if petitioner wanted to challenge that point, he must advance and prove the facts on which he wishes to rely. In order to show that the warrant was illegal, the petitioner had to show (1) that the leave of the Court to execute was not obtained, (2) that the debt was proveable in insolvency. Neither point was raised by him before the trial Court, and it was petitioner's duty to raise them there, so that findings of fact could be given thereon in that Court. I am not prepared to interfere in revision on behalf of a petitioner who wishes to raise here points of fact which he did not put before the trial Court.

The petition is dismissed.

V. N. V. *Petition dismissed.*

CALCUTTA HIGH COURT.

CRIMINAL APPEAL No. 325 OF 1926.

August 13, 1926.

Present:—Mr. Justice Duval and Mr. Justice Graham.

HULAS CHAND BAID—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Cr. P. C. (Act V of 1898 as amended by Act XVIII of 1923), s. 238 (2)A—Charge for substantive offence—Conviction for abetment, legality of—Separate charge, whether necessary—Accomplice, uncorroborated evidence of.

Where an accused is charged for a substantive offence he cannot be convicted of the abetment of the offence without framing a charge for such abetment. [p. 35, col. 1.]

It is unsafe to rely on the uncorroborated evidence of a complainant where he is also an accomplice in committing the offence. [*ibid.*]

Appeal against an order of the Additional Chief Presidency Magistrate, Calcutta, dated the 27th May, 1926.

Mr. *Langford James*, Babus *Debendra Narain Bhattacharjee*, *Rabindra Nath Chowdhury* and *Dhirendra Kumar Bose*, for the Appellant.

Mr. *Khundkar*, (Deputy Legal Remembrancer), for the Crown.

JUDGMENT.

Duval, J.—In this case, the accused was put on his trial under s. 420, Indian Penal Code, before the Additional Chief Presidency Magistrate and sentenced to one year's rigorous imprisonment. The case against him is that he went to the complainant's *gaddi* on some business and subsequently he met the complainant with a Bhatia. The Bhatia then produced a hundred rupee note and said that he could prepare notes like that. On the following day, the Bhatia made a hundred rupee note in the presence of the complainant and the accused and the complainant was satisfied that the Bhatia was a man who could double notes. Then an arrangement was come to under which the Bhatia, the complainant, and the accused were to get a share each in the profits of the doubled notes in a certain proportion, the complainant taking the biggest share presumably because he was the man who was to supply genuine thousand rupee notes for the purpose. Then, on the next day, the 15th February, the complainant borrowed a thousand rupee note and went with the accused to the Bhatia, and the Bhatia made one forged note (apparently unnumbered) by some chemical process and gave 21 unfinished notes to the accused to keep. The complainant was then asked to bring 21 different thousand rupee notes, so that these 21 unfinished notes could be completed by having the numbers reproduced on them from the genuine notes. The story then is that the complainant could only raise 8 thousand rupee notes and that thereupon they met at the accused's *gaddi* in the evening. The Bhatia came there with some chemicals and various processes were performed and suddenly apparently the whole of the notes, genuine notes and other notes, got burnt. As a matter of fact, it appears that the 8 thousand rupee notes somehow must have been extracted from the bundle as they were subsequently cashed in the Currency Office. The complainant, however, lost this money and the Bhatia disappeared. The complainant complained to the Police and the accused has been put on his trial and sentenced as I have said. The conviction has

been under s. 420 read with s. 114, Indian Penal Code.

Now the evidence against the present accused consists simply of the evidence of the complainant himself: and it is urged on accused's behalf that this is insufficient to warrant a conviction. For the appellant it is argued, to begin with, that the charge was under s. 420, Indian Penal Code, and that the provisions of s. 238, Cr. P. C., do not extend to justify a conviction without any charge being framed for abetment of an offence under s. 420 instead of s. 420 itself. For the Crown, it is urged that in the present case the defect, if any, in the charge is immaterial, because the accused fully knew before the charge was framed the case he had got to meet; and it is also urged that there might equally well be a conviction under s. 420, Indian Penal Code. I am of opinion that it was necessary to frame a charge of abetment, if that was the charge on which the man was tried and convicted. But I do not base the decision I am about to give on that alone.

Now the defence was that the accused was equally as much hood-winked and swindled by the Bhatia as the complainant and that he cannot, therefore, be convicted as being an abettor of the Bhatia in this swindle. It is in evidence and it is not denied that towards note-doubling, the accused also produced two thousand rupee notes. But it is urged that he was the man who introduced the complainant to the Bhatia and that when the complainant found that his eight thousand rupee notes had disappeared, the accused did not join with him in finding fault with the Bhatia but he took him home and said that things were all right and that the money could be recovered. It is also urged that the whole of the evidence being that of the complainant, it is not sufficient to justify the conviction. The complainant is an accomplice in an attempt to swindle the Government and the public by the issue of forged notes and it would be unsafe to rely on his uncorroborated evidence as an accomplice as to what the Bhatia did and what the accused did. In this state of evidence, I am by no means convinced that it is sufficient to justify the conviction of the present accused. He, no doubt, introduced the Bhatia to the complainant, but beyond that there is nothing to show that both of them might not equally have been duped by the Bhatia. If that is the evidence, and if there is no direct evidence that the present accused was really in league with the Bhatia or that he found out that this Bhatia could do the trick and so asked the complainant whom he knew to be a more monied man than himself to join in the swindle, this is not, in my opinion, sufficient to prove that the accused, who must have the benefit of doubt, if there is any, actually was a party with the Bhatia in trying to induce the complainant to part with his money.

In this view, I would allow the appeal and acquit the appellant. The appellant will also be discharged from his bail.

Graham, J.—I agree. As regards the legal objection that the accused could not be convicted of the abetment of the offence when there was a charge against him of a substantive offence under s. 420, Indian Penal Code, it seems to me, having regard to the provisions of s. 238, Cr. P. C., that this objection must be held to be well-founded. Sub-section 2A of this section was inserted by Act XVIII of 1923 and, having regard to the manner in which the section expressly makes mention of an attempt to commit an offence, while it is silent with regard to abetment of the offence, the inference, it appears to me, to be that, in the case of abetment, it is necessary that a charge should be framed.

On the merits, it is to be observed that the complainant, on his own showing, was an accomplice in a swindling transaction. That being so, little reliance can be placed upon his evidence. Furthermore, it cannot, I think, be said that the circumstances which have been proved in this case are inconsistent with the appellant having been duped as well as the complainant. In my judgment, the prosecution have failed to prove any facts which may be said to have established the guilt of the accused beyond all reasonable doubt.

I agree, therefore, that the appeal must be allowed.

A. N. A. *Appeal allowed.*

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 760 OF 1925.
(CRIMINAL REVISION PETITION No. 628 OF 1925.)
September 8, 1926.
Present:—Mr. Justice Wallace and
Mr. Justice Madhavan Nair.
In re C. M. PEDDAMALLA REDDI AND ANOTHER—ACCUSED—PETITIONERS.

Penal Code (Act XLV of 1860), s. 294A—Raffle of ginning factory, whether constitutes lottery—"Goods," whether includes immoveable property.

The word "goods" in s. 294A of the Penal Code applies not only to moveables but also to immoveable property.

The publication of an advertisement of a lottery by which a ginning factory is to be raffled is an offence within the meaning of s. 294A, Penal Code.

Petition, under ss. 435 and 439 of the Cr. P. C., 1898, praying the High Court to revise the judgment of the Court of Sessions, Cuddapah, in Cr. A. No. 39 of 1925, preferred against the judgment of the Court of the First Class Deputy Magistrate, Jammalamadugu, in C. C. No. 70 of 1925.

Messrs. *V. L. Ethiraj* and *M. C. Sridharan*, for the Petitioners.

The Public Prosecutor, for the Crown.

ORDER.—The chief question for decision in this case is whether the act of the appellants, *viz.*, publishing an advertisement of a Rs. 54,500 lottery, by which a ginning factory was to be raffled at Rs. 5 tickets, is an offence within s. 294-A of the Indian Penal Code. The argument is that "goods" in the section applies only to moveables and that if the Legislature had intended to include immoveable property, it would have said so in appropriate words. We are not able to accept this contention. The idea of the lottery was that the lucky winner should get the factory for less than its real value, *viz.*, for the actual sum he paid for his tickets, which would undoubtedly be for his benefit. The proposal, therefore, was to do something "for the benefit of any person." There seems no reason, short of complete oversight, why a lottery for moveable goods should be an offence and a lottery for immoveable goods not an offence. The general clause was evidently regarded as sufficient to cover the latter case. The Public Prosecutor has called our attention to the wording of the English Acts, still in force, 8 George I, Chap. II, s. 36 and 12 George II, Chap. XXVIII, s. 1 both of which enact that a lottery for "lands" is an offence. We think there is no substance in this contention.

The next argument is that there is no case proved against the 1st appellant. The lower Courts have found as a fact that he took part in the publication, and we cannot say that there is no evidence on which they could do so. It is quite clear that the 1st appellant's name was throughout associated with the lottery. We reject this contention also.

It is finally urged that the sentence is heavy. We agree with this. All that was called for in the circumstances was a vindication of the law. The lottery was not held and no one is the worse for the publication. We reduce the fine to a fine on each appellant of Rs. 100 (Rupees one hundred) each. The balance, if paid, should be refunded.

Fine reduced;
V. N. V. *Conviction confirmed.*

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 635 OF 1926.
August 13, 1926.
Present:—Mr. Justice Mukerji and
Mr. Justice Roy.
RAM DAS SINGH AND OTHERS—ACCUSED—PETITIONERS
versus
EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 188—Disobedience of order—Accused's knowledge of order, duty of prosecution to prove—Promulgation of order, whether sufficient.

It is the duty of the prosecution in a case under s. 188, Penal Code, to prove by positive evidence that the accused had knowledge of the order with the disobedience of which he is charged and the proof of general notification promulgating the order does not satisfy the requirements of the section. [p. 37, col. 1.]

Emperor v. *Abdullah* (1), followed.

Criminal revision against an order of the Additional Presidency Magistrate, Calcutta, dated the 21st June, 1926.

Babus *Sures Chandra Taluqdar* and *Mahendra Kumar Ghose*, for the Petitioners.

Babu *Manindra Nath Banerjee*, for the Opposite Party.

JUDGMENT.—The petitioners, who are five in number, have been convicted

by the Additional Presidency Magistrate of Calcutta under s. 188 of the Indian Penal Code. The charge against the petitioners was that they had disobeyed an order which was passed under s. 144 of the Cr. P. C. by the Chief Presidency Magistrate on the 4th April, 1926. The order directed the public generally not to assemble or proceed in parties of more than five in number when frequenting streets and public places of Calcutta within a certain specified area. That the petitioners violated this order is clear from the finding of the learned Additional Presidency Magistrate. To convict the petitioners under s. 188 of the Indian Penal Code, however, it is necessary that it should be established that the petitioners knew that there was such an order which prevented them from assembling or proceeding in groups of more than five as referred to in the order. As regards this the learned Chief Presidency Magistrate held that there was a proper promulgation of this order in accordance with the provisions of s. 134, cl. (2) of the Cr. P. C. The learned Magistrate was also of opinion that because such a promulgation has been proved it was not open to the petitioners to plead ignorance of the contents of the order. In my opinion the learned Magistrate was not right in the view that he has taken of the matter. Section 188 of the Indian Penal Code requires that it should not merely be proved that there was an order which was duly promulgated but that also that the accused person who is going to be convicted under the section was aware of it. That the promulgation is not sufficient to establish this knowledge has been held by the Lahore High Court in the case of *Emperor* v. *Abdullah* (1). In that case the learned Judges observed that it is the duty of the prosecution in a case under s. 188 of the Indian Penal Code to prove by positive evidence that the accused had knowledge of the order with the disobedience of which he is charged and that a proof of general notification promulgating the order does not satisfy the requirements of the section. With this observation of the learned Judges I entirely agree. It is true that it was open to the learned Magistrate to take into consideration the facts and circumstances of the case including the fact that the petitioners lived at the place where according to the Police Officer the order was duly promulgated in accordance with the provisions of s. 134 cl. (2) and to come to a finding that the petitioners individually had knowledge of the order itself. The learned Magistrate, however, has not thought fit to draw any such inference from the facts and circumstances of the case; and the materials that have been placed before us by the learned Vakil for the Crown in this Rule do not satisfy us that in point of fact it may be held with any degree of certainty that the petitioners had any such knowledge. For these reasons we are of opinion that one of the cardinal elements necessary to justify a conviction under s. 188 has not been established and that the petitioners' conviction under that section should accordingly be set aside.

In the result, we make the Rule absolute, set aside the conviction of the petitioners under s. 188 of the Indian Penal Code and the sentences that have been passed on them all and direct that the petitioners be acquitted and discharged.

A. N. A. *Rule made absolute*
Accused acquitted

(1) 63 Ind. Cas. 865; 22 C. L. J. 705.

BOMBAY HIGH COURT.

CRIMINAL REFERENCE No. 53 OF 1926.
June 23, 1926.
Present:—Mr. Justice Fawcett and Mr. Justice Madgavkar.
EMPEROR—PROSECUTOR
versus
KALLAPPA DUNDAPPA RUDRANNAVAR AND ANOTHER—ACCUSED.

Explosive Substances Act (VI of 1908), ss. 4, 7—Prosecution for offence under Act triable by Court of Session—Consent of Government, necessity of—Committal before obtaining consent, validity of.

The committal of a person to a Court of Session for being tried for an offence under the Explosive Substances Act which is exclusively triable by a Court of Session is not vitiated by the omission to obtain the consent of the Government for the prosecution in accordance with the provisions of s. 7 of the Act, inasmuch as in a case exclusively triable by a Court of Session committal proceedings are only an 'inquiry' and the trial begins only after the commitment and the framing of the charge. The Sessions Judge, however, cannot proceed with the trial on such commitment before obtaining the necessary sanction.

Criminal reference made by the Sessions Judge, Belgaum.

JUDGMENT.—In this case the two accused have been committed to the Sessions Court of Belgaum for trial on charges of offence under s. 4 of the Indian Explosive Substances Act, VI of 1908. The Sessions Judge has referred the case to us on the ground that the sanction of Government for the prosecution of the two accused has not been obtained in accordance with s. 7 of that Act. We are asked to quash the commitment *in toto*, in order that the prosecution may obtain the necessary sanction and begin proceedings afresh.

Section 7 of the Act in question says: "No Court shall proceed to the trial of any person for an offence against the Act except with the consent of the Local Government or the Governor-General in Council." It is to be noted that these words are not as wide as some similar enactments in the Cr. P. C. For instance, s. 132 says: "No prosecution shall be instituted" without the necessary sanction. Sections 195, 196 and 197, Cr. P. C., use the wide language "No Court shall take cognizance of" the offence without the Government sanction. And s. 339 says "No prosecution shall be entertained" without the requisite sanction. In such cases clearly sanction is necessary to the institution or entertainment of the prosecution before a Court can take cognizance of the offence. But s. 7 of Act VI of 1908 only restrains the Court from proceeding to the trial of any person for an offence under the Act except with this consent.

The committal proceedings are only an "inquiry" as defined in cl. (*k*) of s. 4 of the Cr. P. C. and as is shown by the heading to Chapter XVIII of the Code. An offence under s. 4 of Act VI of 1908 is triable exclusively by a Court of Session. (See Sch. II "Offence against other laws," Cr. P. C.) In a case exclusively triable by a Court of Session, the trial begins only after the commitment and the framing of the charge: *cf. In re Narayanaswamy Naidu* (1). Therefore we are of opinion that it is not necessary to quash the committal proceedings for the want of the sanction does not invalidate those proceedings any more than the proceedings of the preliminary Police inquiry. As, however, the Sessions Judge cannot proceed with the trial of the accused on that commitment without the requisite sanction, he should arrange to postpone the trial till it is obtained. The proceedings should be returned with these remarks.

A. N. A. *Order accordingly.*

(1) 1 Ind. Cas. 228; 32 M. 220; 5 M. L. T. 233; 19 M. L. J. 157; 9 Cr. L. J. 192.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 399 OF 1926.

July 16, 1926.

Present:—Justice Sir George Claus Rankin, KT., and Mr. Justice Roy.

BHUSAN CHANDRA HAZRA—PETITIONER

versus

KANAI LAL ADDYA AND ANOTHER—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 304, 149—Sentence—Adequacy—Ultimate consequences to be considered.

In considering the adequacy of sentence a Court should take into account the ultimate consequences of the acts committed by the accused and not merely their immediate results. [p. 39, col. 1.]

Criminal revision against an order of the Additional Sessions Judge, Howrah, dated the 1st February, 1926.

Mr. *A. C. Mukherjee* and Babu *Satindra Nath Mukerjee* (for Babu *Syama Prosad Mukerjee*), for the Petitioner.

Mr. *Khondkar*, for the Crown.

Mr. *B. C. Chatterjee* and Babu *Probodh Chandra Chatterjee*, for the Opposite Party.

JUDGMENT.

Roy, J.—The accused in this case 7 in number pleaded guilty to a charge under the latter part of s. 304 read with s. 149, Indian Penal Code. The circumstances which led to the death of Hem Kumar Hazra are as follows:—On the 16th April last he was called out of his bed by Chandra Kumar Pal to a tank filled up land where he was attacked by several people with fists and kicks and apparently the kicking was continued until he collapsed. He was carried home and he complained of great pain in the abdomen. Thereafter he was taken to the Hospital where the Assistant Surgeon examined him and found a number of injuries. On the 18th April, Hem Kumar died of peritonites and it appears that, that

was due to the internal injuries received on his abdomen on the night of the 16th April. When the case was taken up before the learned Additional Sessions Judge of Howrah the accused pleaded guilty and the Judge accepted the plea and dealt with four of the accused, namely, Kanai, Bepin, Abani and Gopinath under s. 562 of the Cr. P. C., and he inflicted a fine of Rs. 150 each on Chandra Kumar, Khirode and Surjya Kumar, and he directed that the fines should be paid to the deceased's widow. It is against this decision that there is this application for enhancement of the sentence. We understand that the fines have been deposited but have not been accepted by the deceased's widow.

The present application is for the enhancement of the sentences of these accused persons. For the Crown it is acknowledged that the sentences are somewhat inadequate. In fact the Crown has joined with the petitioner in this case. The learned Counsel appearing for the accused contends that the offence committed was really one under s. 323, Penal Code. He points to an earlier incident that happened that night. It appears that at 9-30 P. M. there was a quarrel between Panna Lal and the deceased. There was a scuffle and the deceased had also two falls. He seems, thereafter, to have gone to bed without any complaint about any hurt to himself. The learned Counsel also points to the injuries simple enough as described by the Assistant Surgeon, and he contends that there was no serious offence committed. We have looked into the commitment record and we consider that the sentences passed on the accused are inadequate. No doubt, the facts that there was an earlier occurrence, that the injuries at first were considered to be simple and that there was a counter-case, probably influenced the Judge in giving a lenient sentence, but it is the ultimate consequences of the acts committed by the accused which will have to be taken into account. The earlier incident does not appear to us to have anything to do with the death of the deceased. There was a simple quarrel and the deceased thereafter went to bed and there was no complaint of any injury. On the other hand, immediately after the assault by the accused the deceased complained of pain in his abdomen and he was taken to the Hospital where peritonites developed, and according to the evidence of the Civil Surgeon the kicks and blows which he complained of are quite consistent with the injuries received. The Assistant Surgeon found the injuries to be simple on a cursory examination, but the injuries were internal and the man seems to have died as a result of such injuries.

In these circumstances we think that the sentence should be enhanced. The learned Counsel contends that there are no circumstances before us on which we can reasonably deal with the accused. But the evidence before the Committing Magistrate is before us and we may take it that when the accused pleaded guilty to the charge, they more or less accepted that evidence. The evidence discloses the different acts which the different accused took in the case and I think we ought to deal with the case on that basis.

The learned Sessions Judge has dealt with four of the accused under s. 562, Cr. P. C. Three of these are mere boys aged 16 or 17 years. Gopinath one of the accused is described as being about 21 years old. This Gopinath was before the Sessions Judge and I take it that the Sessions Judge was satisfied that Gopinath was below 21 years of age. I do not like to interfere with the sentence passed in the case of these four accused, namely, Kanai, Bepin, Abani and Gopinath. Making every allowance possible in the case of the others, namely, Chandra Kumar, Khirode Prosad and Surjya Kumar, I consider that the ends of justice will be met if a sentence of one year's rigorous imprisonment be inflicted on each of them under s. 304, Part II, read with s. 149, Indian Penal Code, and it is ordered accordingly.

The fines, if paid, will be refunded to the accused.

Rankin, J.—I would add in respect of the sentence of the accused that are dealt with under s. 562, Cr. P. C., that I consider that we are going a long way in dealing with this case in that fashion, and we do so having regard partly to the circumstance that the older men engaged in this case were in some cases relatives of theirs and that it is just possible that some of these young lads might have taken some part in the occurrence which did not amount to very much.

A. N. A. *Rule made absolute.*

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 531 OF 1926.

September 17, 1926.

Present:—Mr. Justice Banerji.

DIN DAYAL—ACCUSED—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Cr. P. C. (Act V of 1898), s. 110—Security proceedings—Evidence of suspicion, admissibility of—Order binding over, when to be passed—Conclusive proof of charge, necessity of.

Evidence that a person was suspected of having committed murders is not the kind of evidence admissible for the purpose of binding him over to be of good behaviour.

An order binding a person over to be of good behaviour cannot be passed unless the record upon which the order is passed conclusively proves the charge read out to him under s. 110, Cr. P. C.

Criminal revision from an order of the Sessions Judge, Mainpuri, dated the 7th June, 1926.

Mr. *S. N. Mukerji*, for the Applicant.

The Assistant Government Advocate, for the Opposite Party.

JUDGMENT.—Din Dayal has been bound over to be of good behaviour for three years, and the learned Sessions Judge of Mainpuri has confirmed the order. Din Dayal has come up in revision against that order. Although it is not the practice in revisions to look into the evidence in cases, specially in cases under s. 110 of the Cr. P. C., I am of opinion that this is one of those exceptional cases in which the opinion of the Sessions Judge that the man is a habitual thief and robber and a most dangerous character and that he possesses that reputation in his vicinity, cannot be accepted. The case shows the danger of assuming too much because I find that only one witness has come from the village where Din Dayal lives to give him a bad character, and he is Tej Singh, *Mukhia*, but Tej Singh's evidence really does not prove anything legally against the petitioner Din Dayal. The learned Sessions Judge has assumed that the deficiency of witnesses from the village of the accused on behalf of the prosecution is to be explained by the fact that people know him to be a bad character and are not prepared generally to come and support him. I have looked into the record to find some basis for this assumption of the learned Judge. Witnesses, no doubt, have come forward to say that Din Dayal was suspected of having committed at least four murders but this is not a class of evidence which is admissible for the purpose of binding over Din Dayal. See the case of *Raham Ali* v. *Emperor* (1). A number of witnesses have been called on behalf of the prosecution to prove that Din Dayal bears the reputation of being a habitual thief, dacoit and murderer. Curiously enough these witnesses know nothing about the circumstances of Din Dayal. Their story is most unconvincing and the reason given by them is that because Din Dayal was suspected in murder cases they believed him to be a man of bad character. Some witnesses have come forward to give evidence that as Din Dayal sits on a bridge with a *lathi* with some people who are *badmashes* they believed him to be a *badmash* too. There is no evidence that these persons with whom Din Dayal associates are *badmashes*.

The learned Magistrate has referred to the evidence of Bhatele Shiam Behari Lal as proving the bad reputation of the petitioner. I have read that evidence. It proves absolutely nothing against Din Dayal, and as a matter of fact, this witness does not even know Din Dayal by sight. He, however, says that Din Dayal was suspected of having murdered his *karinda*. This being the state of the evidence it is unnecessary to go into details regarding the evidence called for the defence. A good volume of evidence was called on behalf of Din Dayal but has been brushed aside by the Court of first instance on the ground that these witnesses mostly did not associate with Din Dayal long enough to be able to give any evidence of good character. Some of them are witnesses living in the village of Din Dayal. I have examined all the evidence in the case. Although I realise the difficulties of the prosecution in cases under s. 110 of the Cr. P. C., I cannot, however, shut my eyes and maintain an order unless the record upon which the order is passed is such that it proves conclusively the charge read out to an accused person under s. 110, Cr. P. C. The difficulties can very easily be overcome if the person responsible for the prosecution of a case under s. 110 carefully bears in mind the observations of Mr. Justice Chamier in the case of *Bechai* v. *Emperor* (2). I set aside the order

(1) 20 Ind. Cas. 231; 11 A. L. J. 461; 14 Cr. L. J 407.

(2) 26 Ind. Cas. 153; 12 A. L. J. 937; 15 Cr. L. J. 705.

binding over Din Dayal. If he is in custody he will be forthwith released.

A. N. A. *Order set aside.*

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 196 OF 1926.

June 14, 1926.

Present:—Mr. Justice Banerji.

NIHAL AND OTHERS—ACCUSED—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Cr. P. C. (Act V of 1898), ss. 110, 112, 537—Security proceedings—Preliminary order—Substance of information not recorded, effect of—Irregularity.

However guilty a man may be he is entitled to a trial which is not a sham but a real trial, where the accused knows something about what is happening. [p. 41, col. 2.]

Merely setting out in a notice under s. 112 of the Cr. P. C., that a man is a habitual thief or robber and having the prosecution witnesses ready there and then to go on with the case is not what the Legislature contemplated under that section. The law requires something in the nature of an indictment or charge containing substantial particulars indicating the grounds upon which the Police have given information to the Magistrate. The failure of the Magistrate to record the substance of the information which he has received is not a mere irregularity, which would be covered by s. 537 of the Cr. P. C., but is an illegality which vitiates the trial. [*ibid.*]

Criminal revision from an order of the Additional Sessions Judge, Moradabad, dated the 22nd of February, 1926.

Mr. *S. C. Goyle*, for the Applicants.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—This is an application in revision by six persons named Nihal, Shama, Ghubbar, Mukhtar, Meda and Bhoja, who were bound over to be of good behaviour by a Magistrate of the First Class of Bijnor. The procedure adopted in this case was this. On the 2nd of December 1925 the station officer of Chandpur arrested under s. 55 of the Cr. P. C. a number of men. They were put up before a Magistrate on the 8th who directed a case to be registered and put up the next day. On the 9th of September the Magistrate first recorded an order purporting to be one under s. 112 of the Cr. P. C. as follows:

"Whereas it is brought to my notice that you the aforesaid are habitual thieves, burglars, cattle-lifters, and you associate with bad characters, you are hereby directed to show cause why you should not be directed to enter into a bond of Rs. 100 each with two sureties of Rs. 200 each to be of good behaviour for one year."

Thereafter the case began and sixteen witnesses for the prosecution were examined then and there. The accused, fourteen in number, it appears, were represented by a Mukhtar. Even then it seems to me undesirable that, where persons are arrested under s. 55 of the Cr. P. C. they should not be told the substance of the information against them. As observed by Mr. Justice Walsh in the case of *Rajbansi* v. *Emperor* (1): "It is impossible to lay down any standard to which such notices (under s. 112) are to conform, but when the Legislature provided that a Magistrate should make an order in writing setting forth the substance of the information received, it certainly meant a great deal more than telling a man that he was a suspected thief, because, however substantial that expression may be as an offensive description of an individual, it gives the person alleged to be that character not the slightest intimation as to what are the grounds upon which it is based. If that notice is sufficient, all that would be necessary would be to call upon anybody in India to show cause on the mere statement that he was suspected by the Police to be an habitual thief, but the procedure clearly requires something in the nature of an indictment or charge containing substantial particulars indicating the grounds upon which the Police have given information to the Magistrate." It is, in my opinion, clear that merely setting out in a notice under s. 112 of the Cr. P. C. that a man is an habitual thief or robber, and having the prosecution witnesses ready there and then to go on with the case is not what the Legislature contemplated. However guilty a man may be, he is entitled, in my opinion, to a trial which is not a sham but a real trial, where the accused knows something about what is happening to him. I am, therefore, of opinion that the action of the Magistrate in not recording the substance of the information he had received does not amount to a mere irregularity which would be covered by s. 537 of the Cr. P. C. as argued by the learned Assistant Government Advocate. The learned Sessions Judge no doubt states that the notice was very vague, but he goes on to say that it was read and

(1) 60 Ind. Cas. 420; 42 A. 646 at p. 648; 18 A. L. J. 673; 22 Cr. L. J. 228.

explained to the accused and as there was a fuller Police report, Ex. A 1, on the record which must have come to the notice of the accused or their Mukhtar, he did not think there was any force in the argument adduced on behalf of the petitioners in the Court below.

For these reasons I am of opinion that the order passed against the accused binding them over is bad in law. I set aside the order of the Magistrate binding over the six applicants dated the 11th of October, 1925. If the District authorities are of opinion that action should be taken against them, proceedings must be taken according to law.

Z. K. *Order set aside.*

CALCUTTA HIGH COURT.

MISCELLANEOUS CASE No. 75 OF 1926.

May 26, 1926.

Present:—Justice Sir George Claus Rankin, KT., and Mr. Justice Duval.

BISSESWAR RAJ GARIA—ACCUSED—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Cr. P. C. (Act V of 1898), ss. 54, 76, 491—Goondas Act (B. C. I of 1923), s. 4—Warrant—Bail—Officer's duties—Reasonable amount, if should be fixed—Surety, if must have control over arrested person—Secretary to Government, position of—Executive order when can be raised by High Court—Habeas corpus—*Commissioner of Police acting under Goondas Act, position of.*

Under s. 4 of the Goondas Act where a person is arrested upon a warrant issued under s. 76, Cr. P. C., the business of the officer who fixes the sum of money for releasing the suspect is to fix a reasonable sum having regard to all the circumstances and it is sufficient so far as the person under arrest is concerned that he is willing to execute a bond in that amount. [p. 43, col. 1.]

It would be an illegal abuse of power under the Goondas Act if a surety produced by a person, against whom a warrant is issued, is refused on the ground that he cannot exercise control over the person arrested. [*ibid.*]

The Secretary to the Government in such cases is not in the position of a Court subordinate or inferior to the High Court. [p. 43, col. 2.]

An executive order can be revised only if it comes within the purview of s. 491, Cr. P. C. [*ibid.*]

A Commissioner of Police acting under a warrant issued under the Act is not acting under the Cr. P. C. [*ibid.*]

Application for bail.

Mr. *A. N. Choudhury*, Babus *Satindra Nath Mukherjee* and *Radhicalal Guha*, for the Petitioner.

Mr. *B. L. Mitter*, Advocate-General, and Mr. *Khondkar*, Deputy Legal Remembrancer, for the Opposite Party.

JUDGMENT.

Rankin, J.—The petitioner in this case while in custody under s. 54, Cr. P. C., was served on the 7th of this month with a warrant under s. 4 of the Goondas Act signed by the Chief Secretary to the Government of Bengal. The warrant was in the form which had been duly notified under the Goondas Act in the *Calcutta Gazette* by virtue of s. 4 of the Act and it required the Deputy Commissioner of Police, Calcutta, to arrest the petitioner and it was provided by the form of the warrant that, if the petitioner should give bail himself in the sum of ten thousand rupees with two sureties each in the sum of five thousand rupees to attend before the Commissioner of Police, Calcutta, and to continue to attend, he may be released. That part of the warrant follows without variation the form which is the second form in the Fifth Schedule to the Cr. P. C. It is a form which is drawn up with reference to s. 76 of the Code. The terms of s. 76 are in these words: "Any Court issuing a warrant for the arrest of any person may in its discretion direct by endorsement on the warrant that, if such person executes a bond with sufficient sureties for his attendance before the Court at a specified time and thereafter until otherwise directed by the Court, the Officer to whom the warrant is directed shall take such security and shall release such person from custody". Now, it is the form provided under that section that is used by the Local Government in drawing up the particular form of warrant to be used under the Goondas Act. The petitioner in the present case complains at the Bar of two things. He says that while he applied for bail and tendered certain sureties as being sufficient sureties, his application for bail was illegally dealt with in two ways. First, he says that he was refused his release on the ground that he himself was not, in the opinion of the Deputy Commissioner of Police, good for Rs. 10,000 and he says, secondly, that instead of his sureties being examined to see whether they were sufficient sureties they were considered from a wholly irrelevant and extraneous point of view, namely, from the point of view whether they were persons who were likely to keep the petitioner under control. Now, how far these two complaints of illegal

abuse have been verified by the evidence is a matter to which I shall come in a moment. I want to leave no doubt that either of these two courses would be an illegal abuse of power, not merely on general principles as regards the liberty of the subject but on the face of the Goondas Act itself and on the face of the warrant which is notified for use under the Goondas Act and which was used in this case. The idea that there is to be an enquiry as to whether the person under arrest is good for the sum demanded by the warrant, namely, ten thousand rupees in this case, is, in my opinion, an entirely topsyturvy idea. On this warrant, the business of the officer who fixes the sum of money is to see that he fixes a reasonable sum of money having regard to all the circumstances and that it is not an excessive one and it is sufficient, so far as the person under arrest is concerned, that he is willing to execute a bond in that amount. As regards the question whether the sureties should not be merely sufficient in the ordinary sense but should also be persons who can exercise control over the persons arrested, there is a case reported as *Queen-Empress* v. *Rahim Bakhsh* (1). But that is an authority in favour of permitting that experiment to be made in cases where a person is to give security to keep the peace or to be of good behaviour. So far as this Court is concerned, in the case of *Adam Sheikh* v. *Emperor* (2), that law is objected to and, even in cases under s. 118, Cr. P. C., it has been declared to be bad law to consider whether a surety is likely to have some control over the person arrested. For the present purpose, we have nothing to do with the keeping of peace or being of good behaviour. The sole question in this case is a question of giving security to attend before the Commissioner of Police, Calcutta, on a certain day and continue so to do—a mere question of security to ensure the man's appearance, and I know of no authority that would justify any person in saying that he would waive aside the mere question of the sufficiency of the surety and embark on a consideration of control over the person arrested. That would, in my judgment, be an illegal abuse of power on the face of the Goondas Act and the warrant. Now, the question arises whether on this petition these matters have been made clear in such a way that this Court can interfere. On the question whether this Court can interfere in revision, the petitioner, in my judgment, is under a great difficulty. I am not convinced that the Commissioner of Police acting under this warrant is acting under the Cr. P. C. The section in the Goondas Act says that for certain purposes the warrant shall be deemed to be a warrant issued by a Presidency Magistrate. Now, if this matter be looked at as an application for revision, the first thing is that the applicant has not been to the person who is deemed to be the Presidency Magistrate. He has not applied in this case to the Chief Secretary to the Government of Bengal. Secondly, it has been held in this Court already that the Secretary to the Government in such cases as this is not in the position of a subordinate or inferior Court. That is the decision in *Bhimraj Bania* v. *Emperor* (3). Thirdly, I find it difficult to say that the present purpose would come within either of the two purposes mentioned in s. 4 of the Goondas Act. We have not got to consider here the question of the enforcement of the attendance of the person against whom the warrant is issued at such a place and at such a time. It seems to me, therefore, that this Court has got to look at the proceedings not from the point of view of proceedings in a Court but from the point of view that they are proceedings of the executive armed with certain special powers and the question is whether or not the powers have been exceeded, so that this Court can interfere; in other words, the question must in this case be looked at as one coming within s. 491, Cr. P. C. The question is whether the petitioner is a person illegally or improperly detained in public custody. If he is, then this Court has power to issue a writ of *habeas corpus*. I now come to see whether this petition discloses grounds which would entitle this Court to interfere in the matter by a writ in the nature of *habeas corpus*, and I find, looking over the petition carefully, that, while as a petition asking us to exercise our revisional jurisdiction it might have been of some use to some body there is only one section that is of the smallest use at all to the petitioner on any question under s. 491, Cr. P. C. There is no mention anywhere in the petition as to an

(1) 20 A. 206; A. W. N. (1898) 21; 9 Ind. Dec. (N. S.) 494.

(2) 35 C. 400; 7 Cr. L. J. 439.

(3) 83 Ind. Cas. 500; 51 C. 460; A. I. R. 1924 Cal. 698; 26 Cr. L. J. 20.

enquiry having been made into whether the accused himself is good for Rs. 10,000. There is not a word of this kind in the petition from beginning to end. It is quite clear that this Court cannot act in this petition on that ground at all. Paragraph 9 of the petition says "That the Deputy Commissioner C. I. D. before whom these four sureties were produced said that the said four sureties are not fit to keep the said accused under control and is not accepting those sureties and is not releasing your petitioner on bail." Now, if a case could be made or had been made to the effect not merely that this observation had been made by the Deputy Commissioner but that the Deputy Commissioner had refused to enquire into the sufficiency of the sureties or had been satisfied with the sufficiency but had rejected them, it may be that on this petition a case could be made out of illegal detention. I do not think that the paragraph—by itself scanty and very difficult to be relied upon—would be sufficient to justify this Court in interfering under s. 491, Cr. P. C. The detention is illegal except when in accordance with the terms of the warrant. The accused has failed to furnish the above bail. The direction to the Superintendent of the Jail authorises him to keep the arrested man in custody until he is able to furnish the above bail. But in the present case, in my opinion, no ground has been made out for our interference. The application is accordingly rejected.

Duval, J.—I agree.

M. B.

A. N. A. *Application rejected.*

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 305 OF 1926.
CRIMINAL REVISION PETITION No. 269 OF 1926.
September 14, 1926.

Present:—Mr. Justice Jackson.

In re RAJU ACHARI—ACCUSED No. 1 —PETITIONER.

Cr. P. C. (Act V of 1898), ss. 256, 537—Code of Criminal Procedure (Amendment) Act (XVIII of 1923), s. 72—Charge framed under s. 253—Accused unrepresented by Vakil—Accused required to state forthwith which of prosecution witnesses he wishes to cross-examine—Irregularity, whether cured by s. 537—S. 256, whether applicable to summary cases.

Where a charge is framed under s. 254, Cr. P. C., under s. 256 as amended by s. 72 of Act XVIII of 1923, the accused must be required to state only at the commencement of the next hearing of the case if he wishes to cross-examine any and if so which of the witnesses for the prosecution whose evidence has been taken. If the accused is asked to do so forthwith, the Magistrate should record his reasons in writing. If an accused person is not represented by a Vakil, reason must be shown for not postponing the question to the next hearing. [p. 45, col. 1.]

Where an accused person is not represented by a Vakil and the Magistrate requires the accused forthwith without recording any reasons to state if he wishes to cross-examine the prosecution witnesses the irregularity is one that cannot be cured by s. 537, Cr. P. C. [*ibid.*]

When the Legislature specially amplifies by an amendment a mandatory section, there is no rule of construction which will allow the Courts to treat it as directory. [p. 45, cols. 1 & 2.]

Contravention of an express provision as to a mode of trial is not a mere irregularity. [p. 45, col. 2.]

Subrahmania Ayyar v. *King-Emperor* (3) relied on.

Section 256, Cr. P. C., is applicable to summary trials also. [*ibid.*]

Petition, under ss. 435 and 439 of the Cr. P. C., 1898, and s. 107 of the Government of India Act, praying the High Court to revise the conviction of, and sentence passed upon, the petitioners herein, on 12th March, 1926, by the Court of the Honorary Presidency Magistrates, Royapettah (Egmore in C. C. No. 5099 of 1926).

Mr. *S. Venkataraman*, for the Petitioner.

The Crown Prosecutor, for the Crown.

ORDER.—Petitioner has been convicted under ss. 323, 114, Indian Penal Code, by the Honorary Presidency Magistrate, Royapettah, and seeks to set aside the conviction because the Magistrate asked him forthwith whether he wished to cross-examine the prosecution witnesses without recording his reasons under s. 256 of the Cr. P. C.

It was probably intended by the Code as originally framed that in warrant cases the Magistrate should examine the prosecution witnesses in chief, and, if necessary frame a charge without the intervention of the accused. At the next hearing, the accused could engage his Vakil and cross-examine the prosecution witnesses. Accused persons, however, considered, probably not without reason, that by the time the case reached the charge if the Magistrate had only heard one side, his opinion might be too firmly fixed to be shaken. They preferred, therefore, to cross-examine the prosecution witnesses at the outset. In such cases, a second cross-examination after the charge might often seem a waste of time, and Magistrates were disposed to call upon the accused to re-cross-examine immediately after they had

framed the charge. The accused would protest that they were still entitled to the interval which would be allowed them if they had not chosen to cross-examine and when the Magistrate proved obdurate, dissension and a sense of injustice often supervened.

Therefore by s. 72, Act XVIII of 1923, s. 256 was amended by inserting after the words "to state" the words "at the commencement of the next hearing of the case, or, if the Magistrate for reasons to be recorded in writing so thinks fit forthwith."

This appears to be a very sensible solution of the difficulty. The Magistrate still controls the procedure, but if his ruling runs counter to the wishes of the accused he must support it by reasons. Where the accused is represented by a Vakil from the outset he may generally be asked under the section if he wishes to cross-examine forthwith, for the simple reason that the accused will not be prejudiced and it is convenient to arrange a date for the subsequent attendance of the prosecution witnesses before they disperse.

If, however, he is asked forthwith, with a view to re-calling the witnesses forthwith, fuller reasons will be required, because it is usually convenient to the accused to have an interval in which to study the depositions already on record, and discover material for the cross-examination of the witnesses.

If an accused is not represented by a Vakil, reason must be shown for not postponing the question to the next hearing by which time he can have consulted a Vakil.

In the present case the accused who was not represented by a Vakil, was required forthwith to state if he wished to cross-examine, and the Magistrate recorded no reasons.

It is argued on behalf of the Crown that this is an irregularity curable under s. 537, Cr. P. C. It is difficult to apply this section to the facts of a case of this nature, for when can it be said that no failure of justice has been occasioned by refusing an accused an opportunity to consult a legal adviser? Nor do I think it applicable in law.

Before it was amended, s. 256 was undoubtedly mandatory. If a Magistrate omitted altogether to ask the accused if he wished to cross-examine the prosecution witnesses it could not be said to be a mere irregularity. And when the Legislature specially amplifies a mandatory section, there is, in my opinion, no rule of construction which will allow the Courts to treat it as directory. No doubt a contrary opinion is expressed but without argument in *Ghasiti* v. *Emperor* (1) and I can only say that I respectfully differ. In *Phuman Singh* v. *Emperor* (2) Campbell, J., holds that a contravention of s. 256 is covered by s. 537; but notes the difficulty which I have mentioned above of holding as a matter of fact that accused has not been prejudiced. As regards the law in that case, I doubt if it can really be argued that because s. 535, Cr. P. C., validates a conviction which is attacked merely because no charge has been framed, therefore, s. 537 validates a trial in which s. 256 has been contravened. The safest guide in these questions is the well-known ruling of the Judicial Committee. "Their Lordships are unable to regard the disobedience to an express provision as to a mode of trial as a mere irregularity." *Subrahmania Ayyar* v. *King-Emperor* (3).

In Bombay it has been held that s. 256 is not applicable to a summary trial *Umaji Krishnaji* v. *Emperor* (4) and again I must express my dissent. It is argued that s. 262 which provides that the procedure of warrant cases shall apply to warrant cases summarily tried except where otherwise mentioned, does not make s. 256 applicable to summary trials, because s. 263 relieves the Magistrate of the necessity of framing a formal charge. Section 256 "clearly implies that the Court has had a charge read. It is only then that the occasion arises under which the accused is required to state whether he wishes to cross-examine." But there is no such clear implication in s. 256, which makes no reference at all to a charge, and only happens to come below s. 255 because in the natural order of things the indictment precedes the defence, whether an accused is tried under Ch. XXI or Ch. XXII, and whatever form the charge may take, he must be called upon to plead, and s. 256 which provides for the defence is applicable to either sort of trial. Madgavkar, J., [*Umaji Krisknaji* v. *Emperor* (4)]

(1) 93 Ind. Cas. 72; 6 L. 554; A. I. R. 1926 Lah. 155; 27 Cr. L. J. 408.
(2) 88 Ind. Cas. 518; A. I. R. 1925 Lah. 339; 26 Cr. L. J. 1158; 7 L. L. J. 114.
(3) 25 M. 61; 11 M. L. J. 233; 3 Bom. L. R. 540; 28 I. A. 257; 5 C. W. N. 866; 2 Weir 271; 8 Sar. P. C. J. 160 (P. C.).
(4) 93 Ind. Cas. 159; A. I. R. 1926 Bom. 226; 28 Bom. L. R. 95; 27 Cr. L. J. 431.

holds that in a summary trial there can be no reason for re-cross-examination, but seems to overlook a case like the present case where the accused is put on his defence before he is represented by a Vakil.

The petition is allowed and the petitioner ordered to be re-tried by the Chief Presidency Magistrate, or any Magistrate having jurisdiction to whom he transfers the case.

The conviction and sentence are set aside and the fine, if paid, is to be refunded.

V. N V. *Conviction set aside: Re-trial ordered.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 335 OF 1926.

September 10, 1926.

Present:—Mr. Kotval, Officiating J. C.

HARI GORE—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Cr. P. C. (Act V of 1898), s. 162—Police diaries—Omission to supply copies to accused, whether vitiates trial—Application by accused, when to be made—Proceedings on private complaint, accused's right to copies.

An improper omission to comply with the request of the accused under s. 162, Cr. P. C., to call for the Police diary and to supply him with copies of the statements made by a prosecution witness before the investigating officer vitiates a trial.

An application for copies under s. 162, Cr. P. C., can be made even before the cross-examination of the witness concerned is begun.

Section 162, Cr. P. C., is not inapplicable to cases where the Police, after investigation had refused to challan and the proceedings were started on a complaint.

Application for revision of an order of City Magistrate, Nagpur, dated the 24th June, 1926.

Mr. *V. N. Herleker*, for the Applicant.

Mr. *A. V. Wazalwar*, for the Non-Applicant.

Mr. *G. P. Dick*, for the Crown.

ORDER.—On the 20th July, 1925, three witnesses were examined: The Sub-Inspector as Court witness No. 1, Mangesh, the complainant, as P. W. No. 1, and Sheo Narain Rathi as P. W. No. 2. The witness last mentioned was only partly examined in chief. The rest of his examination-in-chief and his cross-examination were taken on the 23rd July, 1925. On that day the accused put in a written application praying that the Police diary be sent for and that he be supplied with copies of the statements made before the investigating officer by the witness to be called for the prosecution. The Magistrate rejected the application stating that 'they were of no real value as evidence'. It is clear from the record that the diary was at this time not produced in Court and that the Magistrate had not read its contents. This order clearly ignored the provisions of s. 162, Cr. P. C. The offence with which the accused is charged, was reported to the Police, and the Police after investigation had refused to challan it, it being of opinion that the case was the outcome of a love intrigue and was one of a civil nature. In view of this fact the furnishing of the copies was a matter which might be of considerable importance to the accused. It is not possible to say that the Magistrate's rejection of the accused's application has not prejudiced the accused.

The Appellate Magistrate's view that the provisions of s. 162, Cr. P. C., do not apply to a case of complaint, is not justified by anything in that section, and neither the Counsel for the Crown nor the complainant's Pleader has attempted to support it, I am unable to see how the application can be said not to have been made at the right time. To interpret the section to mean that the copies can be demanded only after a witness' cross-examination is begun, which is what I understand the Appellate Magistrate to hold, would lead to inconvenience and delay in the trial. The application does not ask that the copies be furnished then and there or before the witnesses' examination is begun. It asks for no more than what s. 162 allows and that in the very words of the section.

I cannot speculate as to how far the accused would have been benefited if the provisions of s. 162 had been complied with. I hold that the trial is vitiated by the Magistrate's omission to comply with them.

It might be sufficient to order a further enquiry for the purpose of supplying the omission, but on the whole I think the interests of justice will be better served by ordering a new trial before a competent stipendiary Magistrate. The evidence has been recorded in a haphazard fashion without any advertence to the essentialities of the case. Neither the Counsel for the Crown, nor the Pleader for the complainant is able to point to anything on the record which shows that any ornaments were before the witnesses and were shown to them when they professed to identify them.

Shantábai only speaks of owning "all the ornaments mentioned in the list": which list is not clear, there being several on the record.

The charge might have been more explicit as to the property which formed the subject of it. The record of the evidence of the Sub-Inspector (Court Witness No. 1) is full of inadmissible matter. I, therefore, set aside the conviction of the accused and direct that he be re-tried by such competent stipendiary Magistrate as the District Magistrate appoints.

A. N. A. *Re-trial ordered.*

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 325 OF 1926.

July 2, 1926.

Present:—Mr. Justice Banerji

ENAYAT HUSAIN—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Cr. P. C. (Act V of 1898), s. 297—Trial by Jury—Charge to Jury—Discrepancies not explained—Jury asked to return verdict on moral conviction—Misdirection.

In a case tried by Jury the Judge must explain to the Jury the issues of fact which the Jury has to determine upon the charge upon which the prisoners are being tried and having made the Jury understand these issues, the more convenient mode of summing up the case for him to adopt is to present to the Jury, as materially and impartially as he can, a summary of the evidence and the considerations and inferences to be drawn from the evidence as they appear both on the negative and affirmative sides of the case. Merely telling the Jury that there are material discrepancies without setting out those discrepancies amounts to a misdirection.

The Jury have not to return a verdict upon their moral belief of a case but upon the legal proof of the facts constituting the offence. Where, therefore, a Judge repeatedly tells the Jury that if they are "morally convinced" of the guilt of the accused their verdict should be that of guilty, it amounts to a misdirection to the Jury.

Criminal appeal from an order of the Assistant Sessions Judge, Barielly, dated the 7th April, 1926.

Mr. *Mushtaq Ahmad*, for the Appellant.

The Government Pleader, for the Crown.

JUDGMENT.—Enayat Husain has been convicted under s. 377, Indian Penal Code, and sentenced to five years' rigorous imprisonment. The trial was before an Assistant Sessions Judge with a Jury.

The only question is whether there was a misdirection in this case. The heads of charge, as noted down by the learned Judge, do not give a summary of the evidence nor do they show at all whether the learned Judge did or did not do anything more than say to the Jury that there were material discrepancies; and whether those discrepancies were brought to the notice of the Jury or whether the Judge simply told the Jury that there were discrepancies does not appear from the record. Further, the Judge in charging the Jury has more than once used the expression, "If you are morally convinced, your verdict should be that of guilty." Then the Judge records that he agrees with the unanimous verdict of the Jury as regards Enayat. He goes on to say, "There are some doubts, no doubt, but then the doubts are not strong enough to impel me to make a reference to the High Court."

The first point to consider is whether there has been or has not been a misdirection. I am of opinion that there has been a misdirection in this case. Under s. 297 of the Cr. P. C. it is the duty of the Judge to sum up the evidence for the prosecution and the defence. In this case there was no evidence for the defence. I am of opinion that a Judge should explain to the Jury the issues of fact, which the Jury has to determine upon the charge upon which the prisoners are being tried, and having made the Jury understand these issues, the more convenient mode of summing up the case for him to adopt is, in my opinion, to present the Jury, as materially and impartially as he can, a summary of the evidence and the considerations and inferences to be drawn from the evidence, and as they appear both on the negative and the affirmative sides of the case. It is impossible, of course, for any Judge to state every item of the evidence or to draw the attention of the Jury to every fact which has been deposed; but he can without difficulty give a summary of the leading points of the evidence and the considerations and inferences to be drawn from it on the one side or on the other. Merely telling the Jury that there are material discrepancies without telling them about those discrepancies is, in my opinion, a clear misdirection. Further telling a Jury in a case under a section like s. 377 over and over again about their moral conviction as to the guilt of the accused is also, in my opinion, a misdirection. The Jury has not to return a verdict of guilty upon their moral belief of a case, but upon the

legal proof of the facts constituting the offence. I am, therefore, of opinion that the misdirection by the Judge has occasioned failure of justice. I, therefore, set aside the conviction and sentence, and direct a re-trial of Enayat Husain by the Assistant Sessions Judge and a Jury.

Z. K. *Re-trial ordered.*

OUDH CHIEF COURT.

CRIMINAL REVISION No. 101 OF 1926.

November, 4, 1926.

Present:—Sir Louis Stuart, KT, Chief Judge.

NAWAB ALI—APPLICANT

versus

MADHURI SARAN—OPPOSITE PARTY.

Cr. P. C. (Act V of 1898), ss. 435, 439—Order of Civil Court refusing to complain for prosecution for perjury, whether subject to revision.

Under s. 435, Cr.P.C., the Chief Court has no jurisdiction to revise an order of a Civil Court refusing to make a complaint for the prosecution of a person for perjury under the provisions of Ch. XXXV, Cr. P. C.

Thakur Dass v. *Emperor* (1) and *Har Prasad* v. *Emperor* (2), relied on.

Criminal revision against an order of the Second Additional Subordinate Judge, Lucknow, dated the 14th July, 1926, in Appeal No. 1-33-4 of 1926, upholding that of the Munsif, North Lucknow, dated the 5th December, 1926.

Mr. *Harish Chandra*, for the Applicant.

Messrs. *G. H Thomas* and *P. D. Rustogi*, for the Opposite Party.

JUDGMENT.—This is an application which purports to be under s. 439 of the Cr. P. C., against an order of the Additional Subordinate Judge of Lucknow passed in appeal under which he upheld an original order of the Munsif (North) Lucknow, refusing to institute a prosecution against Madhuri Saran for having committed perjury. A preliminary objection has been taken that this Court has no jurisdiction under the Cr. P. C. to determine this application.

Under the provisions of the Cr. P. C., as amended, no private person is permitted to institute a prosecution for perjury committed in a Court and such prosecutions can only be instituted by the Courts themselves. The old provision of the Code, under which a private person could institute such a prosecution, if he obtained permission from the Court to do so, has been abrogated. According to the law, as it now stands as it is contained in Ch. XXXV of the Cr. P. C., when any Civil, Revenue or Criminal Court is of opinion that it is expedient in the interests of justice to make an inquiry as to the desirability of instituting such a prosecution, it is required to investigate the matter and finally either put in a formal complaint upon which the prosecution will be instituted or refuse to prosecute. Its order is open to one appeal which lies to the Court immediately superior to it, should there be such a Court. In this particular instance the order refusing to prosecute is the order of the Civil Court of the Munsif and the Appellate order is the order of the Civil Court of the Additional Subordinate Judge. Under s. 435 of the Cr. P. C. this Court has power to call for and examine records of proceedings before an inferior Criminal Court and has jurisdiction to revise the proceedings of inferior Criminal Courts. The order before this Court is not the order of an inferior Criminal Court but the order of a Civil Court. I took a somewhat similar view in 1913 in *Thakur Das* v. *Emperor* (1), and the view taken by the Judicial Commissioner's Court on that occasion was the view which was taken by a Full Bench of the High Court of Calcutta in *Har Prasad* v. *Emperor* (2). The objection must prevail. The Court has no jurisdiction to determine this matter under the provisions of the Cr. P. C. It has been suggested to me by the learned Counsel for the applicant that I should treat this application as an application in civil revision under s. 115 of the C. P. C. It is sufficient upon this point to decide, as I do decide, that it cannot possibly be suggested that the Courts below have acted without jurisdiction or illegally or with material irregularity. They decided, as they had every right to decide, that on the materials before them they would not prosecute.

I dismiss this application.

G. H. *Application dismissed.*

(1) 22 Ind. Cas. 1001; 17 O. C. 25 at p. 31; 15 Cr. L. J. 217.

(2) 19 Ind. Cas. 197; 40 C. 477; 17 C. L. J. 245; 14 Cr. L. J. 197; 17 C. W. N. 647.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 438 OF 1926.

October 31, 1926.

Present:—Mr. Justice Agha Haidar.

BACHNA *alias* BACHAN SINGH AND ANOTHER—ACCUSED—APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 34, 397—Dacoity—Some dacoits armed with deadly weapon—Liability of other dacoits—Dang, *whether deadly weapon—List of property on search not proved—Proof of contents of list* aliunde—*Legality of search—Omission of accused's name in First Information Report, effect of.*

Section 34, Penal Code, does not apply to s. 397 of the Code, so that if one in a party of dacoits carries a deadly weapon it cannot be said that it would increase the gravity of the offence in the case of his associates who were not similarly armed. [p. 51, col. 1.]

Queen-Empress v. *Mahabir Tiwari* (4), *Crown* v. *Mohra* (6) and *Chatar Singh* v. *Emperor* (7), dissented from.

Emperor v. *Nageshwar* (5), *Dangar Khan* v. *Emperor* (8) and *Queen-Empress* v. *Santa* (9), followed.

A *dang* is not a deadly weapon within the meaning of s. 397, Penal Code. [*ibid.*]

Lad Khan v. *Emperor* (3), followed.

The mere fact that the inhabitants of the locality whose signatures appear on the list prepared by the Police at the time of the search have not been examined in the case does not render the search itself illegal. If the list cannot be proved the contents of the list can be proved by other evidence. [p. 50, col. 2.]

Where in the First Information Report the informant tries his very best to describe the alleged dacoits, the omission of the name of an accused whom the informant knew before makes the case against him doubtful. [p. 50, col. 1.]

Appeal from an order of the Magistrate First Class, exercising enhanced powers under s. 30 of the Cr. P. C., Amritsar, dated the 30th March, 1926.

Mr. *Brij Lal*, for the Appellants.

Mr. *Jagan Nath Bhandari*, for the Government Advocate, for the Respondent.

JUDGMENT.—Early in the morning of the 14th October, 1925, Nawab *Khoja*, a resident of the village Thathi in the Police Circle of Police Station Gharinda lodged a complaint to the effect that ten or twelve persons came to his house towards midnight out of whom three had guns, three had spears and the rest had *dangs*. At the time of occurrence he happened to be sleeping in his shop close to his residential quarters. He was disturbed by these men in his sleep and some violence was used by the dacoits towards him. His son Allah Bakhsh received a *dang* blow and was more seriously injured and during the trial it was noticed that he was limping. The house of Nawab *Khoja* was entered and the inmates of the house including Nawab's wife were terrorised with guns and other deadly weapons and were eventually made to surrender their valuables in the shape of ornaments and other things. The evidence for the prosecution goes on to say that, among the accused persons, at least one man named Gogi, who is absconding, went up to the roof of the house and from there by firing in the air continued to scare away those villagers who approached the house in order to render help to Nawab and his family. It is further in evidence that the dacoits pointed firearms at their victims in order to make them yield their valuables. Having thus robbed Nawab the dacoits decamped under the cover of night. There was a lamp burning in the house of Nawab *Khoja* and in order to facilitate their nefarious work we may take it that the lamp was allowed to remain burning, with the result that the inmates of Nawab's house were able to see faces and other features of some of the dacoits and could identify them. The Police took up investigation and one Ganga Singh, a No. X *badmash*, gave the first clue to Harnam Singh, *Sufedposh*, with the result that the Police pursued their enquiries in the quarter indicated by Ganga Singh and Harnam Singh *Sufedposh*. As a result of the enquiries the Police caught the five appellants in various villages in the adjoining district of Lahore. The houses of the accused were searched but nothing incriminating was found by the Police. Later on, however, the five accused persons pointed out to the Police the exact places where they had concealed their share of the booty. The result was that jewelry was found buried and concealed in the houses of Hakam Singh, Mit Singh, Saudagar Singh and Mohan Singh. Bachan Singh mentioned one Bhagat Singh goldsmith of the village Jaman as a man who had a portion of the stolen jewelry in his possession. A search of the houses of the various accused was made not only in the presence of the *Lambardar* and *Sufedposh* of the village Thathi but also of some of the residents of the village in question. The Additional District Magistrate, who tried the case, came to the conclusion that the identification in the case of the five appellants was sufficient and that furthermore a very large portion of the stolen property was found out in the manner as described above. The Magistrate convicted

and sentenced each of the five appellants to rigorous imprisonment for seven years including three months' solitary confinement and a fine of Rs. 500 or in default to undergo further rigorous imprisonment for one year.

As stated above, Gogi, who is alleged to have been one of the dacoits, has been absconding and so nothing need be said about him except what has already been mentioned that he was the man who was firing in the air from the top of the house.

The case was argued at considerable length by the Counsel appearing on behalf of the appellants. It is said in the first instance that the identification proceedings were not properly conducted, with the result that the prosecution witnesses who had identified the accused persons might have had an opportunity to see the various accused beforehand and, therefore, had no difficulty in identifying them before the Magistrate of the Court. The learned Magistrate has appended a very helpful chart in his judgment which gives the names of those witnesses who identified the several accused. The identification proceedings seem to have been perfectly above board and it cannot be said that they were in any way vitiated by any irregularity. In the case of Bachan Singh only the difficulty is created by the fact that, though in his First Report Nawab *Khoja* tried his very best to describe the alleged dacoits, yet he did not mention Bachan Singh, although in his evidence before the Court he says that he knew him before. This makes the case of Bachan Singh at least doubtful. If he was present in the dacoity and if, as claimed by Nawab himself, he was known to Nawab, there is not the least doubt that Nawab would have certainly mentioned his name in the First Information Report. As to the property which has been recovered at the instance of Bachan Singh it should be noted that the property was actually found in the possession of Bhagat Singh goldsmith. This Bhagat Singh goldsmith produced a *bahi* in order to show that the entry of the various articles of jewelry, produced by him, was to be found in it. The *bahi* does not contain the name or signature of Bachan Singh. It does not give any date and it is also silent as to the alleged purpose for which the jewelry may have been given to him. All this makes the entry a very suspicious document and, having regard to the omission of Bachan Singh's name from the first report in spite of the fact that Nawab *Khoja* swore that he knew him and the unsatisfactory nature of Bhagat Singh's evidence as well as the *bahi* produced by him, the case of Bachan Singh is not free from doubt. It cannot, therefore, be said that the evidence against him is of such a convincing nature as to prove his guilt beyond any possibility of doubt. I, therefore, accept the appeal of Bachan Singh, set aside his conviction and sentence and direct that he may be released forthwith.

The case of other four appellants, *i. e.*, Hakam Singh, Mohan Singh, Mit Singh and Saudagar Singh, however, is entirely different. As already stated, their identification has been fully established and no serious flaw can be pointed out in the identification proceedings. The property was recovered in the houses of these four appellants and they pointed out the same. It was argued by Mr. Hakumat Rai, who appeared on behalf of Mohan Singh and Hakam Singh appellants, that at time of the search in the native villages of his clients respectable persons of the locality were not called to witness the search. As a matter of fact, apart from the *lambardar* and *sufedposh* of *Mauzah* Thathi, the *Lambardars* of the villages where the accused lived were present and signed the list. In any event if the list cannot be proved the contents of the list can be proved by other evidence, *vide* *Solai Naik* v. *Emperor* (1). This has been done in the present case. The fact that the inhabitants of the locality whose signatures appear on the list prepared by the Police at the time of the search had not been examined in the case would not render the search itself illegal. The principle enunciated in *Sri Sri Nadaduru Rajaguru Satagopala Charlu* v. *Satrughna Behara* (2) applies.

The result is that the convictions of Hakam Singh, Mohan Singh, Mit Singh and Saudagar Singh are maintained. It remains, however, to be seen what punishment should be awarded to the four unsuccessful appellants. The minimum punishment under s. 397 of the Indian Penal Code, is seven years rigorous imprisonment. Now with the exception of Gogi who is alleged to have been armed with a gun,

(1) 8 Ind. Cas. 178; 34 M. 349; 8 M. L. T. 451; 21 M L. J. 281; 11 Cr. L. J. 576; (1910) M. W. N. 677.

(2) 16 Ind. Cas. 75; 23 M. L. J. 445; (1912) M. W. N. 1111; 13 Cr. L. J. 763.

the remaining four of the accused persons have not been shown to have been armed either with spears or with guns. We may take it that they had only *dangs* in their possession. Now, a very learned and experienced Judge of the Allahabad High Court had laid down that *lathi* is a 'lethal' weapon which in plain English means a 'deadly' weapon, mentioned in s. 397 of the Indian Penal Code. I take it that *dang* is the same thing as *lathi*. But in the case of *Lad Khan* v. *Emperor* (3) it was held that *lathi* is not a deadly weapon. Therefore, it follows that, with the exception of Gogi, there is no evidence that the four appellants were armed with anything else except *lathis* or *dangs*. Section 34 of the Indian Penal Code does not apply to s. 397, so that if one in a party of dacoits carries a deadly weapon it cannot be said that it would increase the gravity of the offence in the case of his associates who were not similarly armed. There has been a conflict of authorities on this point. Some learned Judges invoked in aid the provisions of s. 34, Indian Penal Code, while interpreting the provisions of s. 397 and came to the conclusion that the fact that one in a party was armed with a deadly weapon aggravated the offence of all. This was the law laid down in *Queen-Empress* v. *Mahabir Tiwari* (4). This view, however, was abandoned in *Emperor* v. *Nageshwar* (5) and the history of the case-law on this point in the Lahore High Court had been parallel to that of the Allahabad Court. The Chief Court of the Punjab, the predecessor of our present High Court, in two reported cases at least (*i*) *Crown* v. *Mohra* (6) and (*ii*) *Chatar Singh* v. *Emperor* (7) had adopted the view expressed in *Queen-Emperor* v. *Mahabir Tiwari* (4). But I find that recently in the case of *Dangar Khan* v. *Emperor* (8) this Court has accepted the law as laid down in the case reported as *Emperor* v. *Nageshwar* (5); see also *Queen-Empress* v. *Santa* (9).

The result is that in the absence of specific evidence that these four appellants were armed with anything more dangerous than a mere *lathi* or a *dang* the offence does not render each and every one of them guilty of the offence under s. 397 but under s. 395 of the Indian Penal Code under which the Court has not the discretion to order rigorous imprisonment for a term which may extend to ten years. I, therefore, reduce the sentence passed upon these four appellants to five years' rigorous imprisonment under s. 395 and thus modify the order and the sentence passed by the Additional District Magistrate, Amritsar. I do not see any point in inflicting a fine of Rs. 500 upon each of the appellants. Nawab *Khoja* has been able to recover the great bulk of the property of which he had been robbed by the dacoits and the Magistrate, having regard to this circumstance has refrained from passing an order compensating him for any loss. If the sentence of a fine of Rs. 500 were to be maintained the unfortunate families of the four appellants would suffer great hardship. I, therefore, order that no fine should be exacted from the appellants. The sentence of solitary confinement stands. To the extent of these modifications the appeals of the remaining appellants are allowed in parts. As to the rest, I dismiss the appeals of Hakam Singh, Mohan Singh, Saudagar Singh and Mit Singh.

R. L. *Appeal dismissed.*

(3) 13 Ind. Cas. 998; 117 P. L. R. 1912; 19 P. W. R. 1912 Cr.; 13 Cr. L. J. 182.
(4) 21 A. 263; A. W. N. (1899) 76; 9 Ind. Dec. (N. S.) 876.
(5) 28 A. 404; A. W. N. (1906) 61; 3 Cr. L. J. 322.
(6) 16 P. R. 1901 Cr.
(7) 15 P. R. 1901 Cr.
(8) 68 Ind. Cas. 817; 5 L. L. J. 224; 23 Cr. L. J. 593; A. I. R 1923 Lah. 104.
(9) A. W. N. (1899) 186.

CALCUTTA HIGH COURT.

JURY REFERENCE No. 25 OF 1925
AND
CRIMINAL APPEAL No. 322 OF 1926.
August 2, 1926.

Present :—Justice Sir George Claus Rankin, KT., and Mr. Justice Mukerji.

MAMAT ALI AND OTHERS—ACCUSED
versus
EMPEROR—OPPOSITE PARTY.

Cr. P. C. (Act V of 1898), s. 307—Unanimous verdict of Jury—Case suspicious—High Court's power to disagree—Conviction on verdict of Jury—Appellate Court, when interferes—Error of law—Omission to place important piece of evidence before Jury, effect of.

In a reference under s. 307, Cr. P. C., the High Court may, in view of suspicious circumstances tending to prove that the prosecution case was false, and all the other circumstances of the case, dissent

from the unanimous verdict of a Jury and acquit an accused. [p. 54, col. 1.]

A conviction by a lower Court accepting the verdict of a Jury cannot be set aside by the High Court in appeal unless there is an error of law.

Where a Judge in putting a case before the Jury omits to place before them an important piece of evidence favourable to the accused, he commits an error of law. [*ibid.*]

Reference by and Criminal appeal against an order of the Assistant Sessions Judge, Assam Valley District, dated the 5th May, 1926.

Babu *Manmatha Nath Ray*, for the Appellant.

Babu *Lalit Mohan Sanyal*, for the Crown.

JUDGMENT.

Mukerji, J.—The three accused persons Mamat Ali, Manik Ram and Jumar Sheikh were tried by the Assistant Sessions Judge of the Assam Valley District with the aid of a Jury on a charge under s. 436, Indian Penal Code. The Jury brought in a unanimous verdict of guilty against all the three accused. The learned Judge accepted the verdict so far as it was against Jumar Sheikh and convicted the said Jumar Sheikh under s. 436, Indian Penal Code, and sentenced him to undergo rigorous imprisonment for 5 years.

Jumar Sheikh has appealed to this Court and his appeal is No. 322 of 1926. The learned Judge disagreed with the verdict of the Jury in so far as it was against Mamat Ali and Manik Ram, and being unable to accept the same has made a Reference to this Court under the provisions of s. 307, Cr. P. C. That Reference is No. 25 of 1926.

I propose to take up the Reference first because it will enable me to deal with the facts of the case. The informant Sastiram Mandal has two brothers one Banchit and one Nao Chanda. The informant lives in the village of Rampur Azagora in the Sub Division of Gauhati in the District of Kamrup. Banchit lives at a place called Arara which is about 6 or 7 miles from Rampur Azagora. Nao Chanda works as a peon at Gauhati. The case for the prosecution is that at about 12 P. M. on the night of the 3rd January, 1926, the informant Sastiram woke up on hearing the barking of a dog and on coming out noticed that his thatching grass was on fire. He took up a *dao* and went out and saw Mamat setting fire to the thatching grass. He approached Mamat whereupon all the three accused persons fell upon him and there was a scuffle the result of which was that he received certain injuries.

During the scuffle, however, he succeeded in snatching away the napkin which was with Mamat. The accused persons, it is said, thereupon left the place. It is for this occurrence that the accused were put upon their trial on a charge under s. 436, Indian Penal Code. The occurrence as I have said took place in the night of the 3rd January, 1926. The prosecution case is that when next morning Banchit one of the brothers of the informant came to the village of Rampur Azagora quite accidentally for the purpose of purchasing thatching grass he came to know that Sastiram's house had been set on fire and had been burnt down, and he came and saw Sastiram. This it is said was in the morning. It appears, however, that at about noon a telegram was sent by Banchit to Nao Chanda who was at Gauhati. The telegram ran as follows:—"All burnt last night, come immediately." On the next day, that is to say, the 5th January, 1926, Nao Chanda arrived from Gauhati and thereafter the First Information was given to the *Thana* at about 7 P. M. in the evening, the *Thana* being about 7 miles from the place of the alleged occurrence. That the informant's house consisting of no less than 9 huts were burnt down as the result of the occurrence is a fact which cannot be doubted or disputed. But the question in the present case is as to the complicity of the accused persons. I am not prepared to go the length of suggesting that if Sastiram was in a position to recognize the culprits a telegram of this description could not possibly have been sent by Banchit to Nao Chanda. But the difficulty is created by the explanation which Sastiram and Banchit themselves have given with regard to this matter. Banchit's explanation is that although he met Sastiram in the morning, he without the knowledge of Sastiram and without being requested by Sastiram sent this telegram to Nao Chanda and he did not give the details of the occurrence, because as a matter of fact he had not been able to gather the particulars from Sastiram. This, however, seems to me to be an explanation which is not at all reasonable. If as a matter of fact the two brothers had met in the morning and had conversation between them it does not appear that there was any reason whatever for Sastiram not having communicated to Banchit the fact that he had recognized the three persons as culprits. Then again no information, as

I have said, was lodged with the Police until 7 P. M. of the 5th January, 1926. The explanation offered for this unusual delay is that Sastiram was ill. This explanation, however, can hardly be accepted in view of the fact that Sastiram was not ill on the night of the 3rd January, 1926, when the occurrence took place when he was in a position to go out with a *dao* in his hand to meet those who were setting fire to the thatching grass. Moreover, Sastiram appears to have walked a distance of no less than 7 miles in order to lodge the First Information which he did personally at the *Thana*. There is also evidence that Sastiram met and spoke to many persons that came to him on the day after the occurrence. In the face of these facts the delay in lodging the First Information seems to me to be somewhat suspicious and the explanation offered by Banchit for the telegram he sent, to my mind, is not also acceptable.

Turning now to the evidence relating to the occurrence itself the identification of the accused persons rests upon the evidence of Sastiram and two witnesses, namely, witness No. 2 Lalo and witness No. 3 Santiram. These two witnesses in the first place are interested witnesses, Lalo being a person whose son had married Nao Chanda's daughter, and Santiram a person who was proposing the marriage of a son of his with another daughter of Nao Chanda. These two witnesses profess to have recognized the accused persons, although as a matter of fact on the night in question there were no less than 8 persons present in the house of the informant. The explanation which is given for the presence of these two persons in the informant's house on that particular night is that because Nao Chanda had gone away from home and the nephew of the informant also had followed him, it was necessary for protection to get these two persons to come and sleep in the house. It is said on behalf of the prosecution that these two persons were brought to the house by Sastiram on the very day, namely, the 3rd January, 1926. There is a certain amount of conflict in the evidence of these two witnesses as to the occasion or occasions at which they had previously accommodated the complainant in a similar way. But I am not inclined to pay any particular attention to that conflict, for it may perhaps be explained. What weighs with me most is the fact that in the information which Sastiram lodged at the *Thana* he did not mention the names of these two witnesses who according to him were the most important witnesses in this case they having seen the occurrence and recognized the persons who had taken part in it. It should be mentioned here that the information was in the shape of a written complaint which he filed with the Sub-Inspector. Then there is the fact that Lalo although in his examination-in-chief stated that he saw the faces of the accused persons and for that reason was able to recognize them, and in his cross-examination he modified that statement to this extent that the accused persons were running away and they suddenly turned and looked at him and that was the opportunity that he got for recognizing them. This to my mind is a very unsatisfactory piece of evidence. Then with regard to the other witness Santiram it is clear from his cross-examination that he did not see the faces of the accused persons because he admitted that fact when he was cross-examined. For these reasons it seems to me exceedingly doubtful as to whether these two persons were at all present in the house of the informant on the night in question, and even if they were there it is exceedingly doubtful that they could recognize the accused persons or such persons as may have set fire to the informant's house.

There are a number of witnesses then who say that when they came up they heard from the informant that it was these three accused persons who were concerned in the act. Of these mention may be made of three, namely, P. W. No. 5 Ataban a cowherd of the informant, P. W. No. 6 Lalit Ram the nephew of the informant and P. W. No. 10 Jogeswar Sarma the priest of the informant. It is somewhat singular, that although it appears upon the evidence that a very large number of persons came immediately after the occurrence and on the next morning, some of the witnesses having put down their number at 30 or so, it is only these three persons who are interested in the complainant and some of them dependant on him who came forward to corroborate the complaint on this part of the case. Even if the complainant did give out the names of these three persons to them, that, in my opinion, is sufficiently accounted for by the fact, that admittedly there was litigation pending between the accused's party and the complainant's party, and on the very next day, namely, the 4t

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January, 1926, one of the cases pending between them was to be taken up at Gauhati. Furthermore it appears from the evidence of Nao Chanda, himself that some 6 or 7 months before the date of the occurrence the accused persons or men of their party had threatened Nao Chanda that they would set fire to his house. The complainant, if this part of the evidence is true, had very good reason then to suspect that the offence must have been committed by the accused persons and it was for that reason that he gave out their names. There is one other bit of evidence to which I shall refer and that is the evidence of P. W. No. 14 Puaram Kachari. That evidence seems to me to be too good to be true, for he says that on the evening of the Saturday the 3rd January, 1926, he overheard a conversation between these three accused persons and another man who were at that time in Mamat's field to the effect that they would set fire to the house of the informant. This witness, however, gave no such story when examined before the Committing Magistrate.

These are suspicious circumstances which, in my opinion, are enough for us to hold that the story put forward on behalf of the prosecution is not an acceptable story; and in view of all the circumstances of the case I would, agreeing with the opinion of the learned Judge and dissenting from the verdict of the Jury, unanimous though it is, accept the Reference which the learned Judge has made. I would accordingly set aside the verdict of the Jury so far as it relates to Mamat Ali and Manik Ram and direct that they be acquitted and discharged.

I turn now to the appeal. We cannot interfere with the conviction of the appellant unless there is a point of law. But it seems to me that in putting the case as against this accused Jumar Sheikh before the Jury, the learned Judge fell into an error of law in that he omitted to place before the Jury some very important evidence which is in favour of this appellant, it will be seen that the evidence as against this accused is precisely the same as the evidence against the other two. But there is only this difference that this accused bore mark of a scratch on his person. The Civil Surgeon gave as his opinion that the scratch could have been caused by the finger nail of the informant. The learned Judge in placing this evidence before the Jury gave these directions: "As regards Jumar Sheikh we have some additional evidence. The Civil Surgeon thinks it likely that the scratch on his forearm was caused by the long nail of the complainant in the struggle. You are not bound by the opinion of the Civil Surgeon, but he is an expert. The accused says that he received the scratch in cutting bamboo. Whether this could be so was not put to the Civil Surgeon". Assuming for a moment that there was justification in putting before the Jury the suggestion that this scratch was caused by split bamboo and had not been put to the Civil Surgeon, the learned Judge should have at the same time placed before the Jury another bit of evidence which appears in the deposition of the Civil Surgeon himself and which is to the effect that the scratch could have been caused by other means as well. Furthermore, it seems to me that on the question of probability the learned Judge should have drawn particular attention of the Jury to the passage in the complainant's evidence where he says that he intentionally hurt Jumar with his finger nails with a view to keep mark of identification, and should have also drawn the attention of the Jury to the fact that this important incident—important in the view that the complainant took of the matter, was not mentioned by the complainant in the First Information which he lodged at the *Thana*. The omission to direct the Jury upon an important point like this which may serve to help the defence of the accused, in my opinion, amounts to misdirection. I am accordingly of opinion that the conviction of this appellant Jumar Sheikh and the sentence passed on him should also be set aside. In view of the unsatisfactory nature of the evidence to which I have already referred I do not think that this is a case in which we should be justified in ordering a re-trial of the accused Jumar Sheikh.

The accused persons will now be discharged from their bail-bonds.

Rankin, J.—I agree.

A. N. A. *Accused acquitted.*

LAHORE HIGH COURT.

CRIMINAL REVISION No. 1237 OF 1926.

October 29, 1926.

Present:—Mr. Justice Harrison.

RUR SINGH—ACCUSED—PETITIONER

versus

EMPEROR—RESPONDENT.

Workman's Breach of Contract Act (XIII of 1859), ss. 2, 3—Ordering re-payment of advance and imprisonment in default by same order, legality of—Imprisonment, when to be ordered—Imprisonment for default of each instalment, legality of.

A Magistrate cannot order a workman to be imprisoned by the same order by which he directs him to make a payment. An order for imprisonment should be a separate order passed after the workman has failed to comply with the order about re-payment. Nor where the sum is ordered to be payed by instalments, can a Magistrate by a single order award a separate term of imprisonment for default of each instalment.

Case reported by the Sessions Judge, Karnal, with his No. 383-J of 7th August, 1926.

FACTS.—Sahib Singh's complaint was that he had advanced Rs. 50, Rs. 32 and Rs 24-4-0 to accused Rura Singh in order to perform certain work on the Grand Trunk Road but that Rura Singh had done work worth only Rs. 25 and declined to do the rest.

Rura Singh's version was that he had done work worth Rs. 62½ and re-paid more than the remaining amount to complainant. The Magistrate found that the accused had performed work of the value of Rs. 62-8-0 but not re-paid the balance. Under s. 2 of Act XIII of 1859 the Magistrate ordered Rura Singh to re-pay Rs. 45 in nine monthly instalments of Rs. 5 each or in default to undergo 15 days' imprisonment for default of each instalment the total period of imprisonment being limited to two months.

GROUNDS.—So far as the facts of the case are concerned I think that the finding of the Magistrate is right. Applicant has failed to prove that any sums of Rs. 10 and Rs. 12 were paid to Sahib Singh. As to the six sums of Rs. 36 realised by the complainant from other workmen he has filed a receipt (P-D) which shows that these re-payments were by other workmen for advances received by them.

The final order of the Magistrate about imprisonment in default does not, however, seem to be right. In the first place the language of s. 2 shows that the Magistrate cannot order the workman to be imprisoned by the same order by which he directs him to make a payment. The words of the section are, "if such artificer, workman or labourer shall fail to comply with the said order, the Magistrate may sentence him to be imprisoned" etc. I think it is clear from this that the order about imprisonment should be a separate order passed after the workman has failed to comply with the order about re-payment etc. In the second place, the order of 15 days' imprisonment for default of each instalment also does not seem to be right for it implies that by one order the accused has been sentenced to several periods of imprisonment with free intervals between. I do not think our Criminal Law contemplates such sentences. For instance a man can be sentenced for theft for three years but a Magistrate cannot sentence a thief to two separate terms of one year each with an interval of six months between.

The proceedings are, therefore, submitted to the High Court for revision of the sentence with a recommendation that the sentence of imprisonment may be set aside leaving the Magistrate to pass a sentence after default has been made by the applicant in making the payments ordered by the Magistrate.

ORDER.—The order of the Magistrate regarding imprisonment is clearly illegal. For the reasons given by the learned Sessions Judge, I set it aside and leave the Magistrate to pass a sentence in accordance with the law if default is made.

R. L. *Petition accepted.*

MADRAS HIGH COURT.

CRIMINAL MISCELLANEOUS PETITION No. 170 OF 1926.

April 15, 1926.

Present:—Mr. Justice Wallace.

SRIRANGA CHETTIAR—ACCUSED—PETITIONER

versus

SUBRAMANIA ASARI—COMPLAINANT—RESPONDENT.

Cr. P. C. (Act V of 1898), ss. 350, 528—Transfer of Magistrate—De novo trial before succeeding Magistrate, order of—Transfer to Magistrate who originally heard evidence, whether legal.

Where, after the transfer of a Magistrate during the pendency of a criminal case, his successor has

taken cognisance of the case *de novo*, it is not competent to a District Magistrate to re-transfer the case to the Magistrate who originally heard the evidence with a view merely to avoid the *de novo* trial.

Petition, praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to issue an order directing that C. C. No. 2 of 1926 on the file of the Court of the Stationary Sub-Magistrate, Bhavani, may be re-transferred from the file of the Stationary Sub-Magistrate, Gobichettipalayam (to whose file it has been transferred and where it has been numbered as C. C. No. 122 of 1926), to the file of the Court of the Stationary Sub-Magistrate, Bhavani, and also directing stay of further proceedings in the said C. C. No. 122 of 1926, in the Court of the Stationary Sub-Magistrate, Gopichettipalyam pending disposal of this petition.

FACTS.—In a trial of two accused persons on a charge of theft under s. 379, Indian Penal Code, the Stationary Sub-Magistrate of Bhavani framed a charge against one accused and discharged the other. Pending the further cross-examination of the prosecution witnesses, the Magistrate was transferred to another station, Gobichettipalayam in the same district. When the new Magistrate took charge at Bhavani the accused claimed and was granted a trial *de novo*.

At that stage the complainant applied to the District Magistrate to re-transfer the case from the file of Bhavani Magistrate to that of Gobichettipalayam so that the Magistrate who originally framed the charge might himself dispose of it. The District Magistrate granted the petition and the case was transferred to the file of the Gobichettipalayam Magistrate and was numbered C. C. No. 122 of 1926. The accused, thereupon, applied to the High Court objecting to the procedure adopted and asked for re-transfer of the case to the file of the Sub-Magistrate, Bhavani. See *Sardar Khan Sahib* v. *Attaulla* (1).

Mr. *K. V. Sesha Iyengar*, for the Petitioner.

Mr. *S. Venkatarama Sastri*, for the Respondent.

Mr. *K. N. Ganapathi*, for the Public Prosecutor, for the Crown.

ORDER.—It is clear that the Stationary Sub-Magistrate of Bhavani has taken cognizance of the case *de novo* before the transfer to the Stationary Sub-Magistrate of Gobichettipalyam. The latter, therefore, has no jurisdiction to proceed with the case. The case is, therefore, re-transferred to the Stationary Sub-Magistrate of Bhavani who will now proceed with it.

V. N. V. *Order accordingly.*

(1) 85 Ind. Cas. 254; 20 L. W. 847; 47 M. L. J. 926; A. I. R. 1925 Mad. 174; 26 Cr. L. J. 510.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 808 OF 1926.

November 1, 1926.

Present:—Mr. Justice Jai Lal.

FAJJOO AND ANOTHER—ACCUSED—APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 304—Sentence—Deceased and not accused the aggressor—Severe sentence, propriety of.

A severe sentence should not be passed where the aggressor was the deceased and not the accused.

Appeal from an order of the Magistrate, First Class, exercising enhanced powers under s. 30, Cr. P. C., Pind Dadan Khan, District Jhelum, dated the 28th June, 1926.

Mr. *Ram Lal*, for the Appellants.

Mr. *Din Dyal*, for the Government Advocate, for the Respondent.

JUDGMENT.—The Magistrate has found, and this finding is not attacked on appeal before me that the appellants and the deceased had a dispute about the ownership of some land. The accused, however, were in possession thereof and had erected some sort of building on it. On the morning of the 30th of May, 1926, the deceased Raham Ali and his brother Hasham Ali went to this land 'either to molest the accused when they were levelling the ground or to remove the building that had been constructed by them' and a fight ensued between the parties with the result that the appellants Fajjoo and Jawan caused a large number of injuries on the person of the deceased which resulted in his death soon after. Hasham Ali escaped without receiving any injury.

Both parties produced evidence which supported the main story of the prosecution with the only variation that according to the defence evidence the deceased received his injuries not at the hands of the accused but owing to the building having fallen on him when he was demolish-

ing it. This story has been rightly rejected by the Magistrate as untrue.

The weight of the evidence is in support of the conclusions of the Magistrate and as the learned Counsel for the appellants has not seriously attempted to attack the finding of the Magistrate I do not think it necessary to discuss the evidence in detail.

The only point on which the Counsel addressed me was the question of sentence. After hearing the Counsel for the Crown I have come to the conclusion that the sentence in this case is severe in view of the fact that the deceased and his brother Hasham Ali were the aggressors from the commencement. They had no business to go to the disputed land which was admittedly in possession of the accused either to molest them or to remove the buildings. Under all the circumstances I consider that a sentence of five years' rigorous imprisonment will be adequate and accepting this appeal I reduce it accordingly.

R. L. *Appeal partly accepted.*

CALCUTTA HIGH COURT.

CRIMINAL REFERENCE No. 24 OF 1926.

August 5, 1926.

Present:—Justice Sir George Claus Rankin, KT., and Mr. Justice Mukerji.

EMPEROR—PROSECUTOR

versus

CHANDRA KUMAR DE—ACCUSED.

Penal Code (Act XLV of 1860), ss. 182, 471—False identification, when offence under s. 182—Dishonest intention, necessity of.

A person who wrongly identifies another before a public servant as the payee under a forged cheque drawn in the name of a fictitious person cannot be convicted of an offence under s. 182, Penal Code, in the absence of evidence to show that he knew or had reason to believe that the identification was false. [p. 58, col. 1.]

Criminal reference by the Second Additional Sessions Judge, Bakerganj, dated the 3rd May, 1926.

Babu *Anil Chandra Roy Choudhury*, for the Crown.

Babus *Suresh Chandra Taluqdar*, *Jyotish Chandra Guha* and *Radhika Ranjan Guha*, for the Accused.

JUDGMENT.

Rankin, J.—In this case, the accused Chandra Kumar De, who appears to be an old man of 80 years of age was tried before a Judge and Jury on several charges. The first charge against him was really abetment of forgery and the second charge was really conspiracy to cheat. On those two charges, the Jury acquitted the accused and the learned Judge who makes this Reference agreed with the Jury and held that their verdict was right. There were, however, two other charges against the accused, a charge under s. 182, Indian Penal Code, and another of cheating under s. 420, Indian Penal Code; and the learned Judge has made this Reference because he considers that the accused ought to have been convicted upon those two counts.

Now, the facts very shortly are that some person in June, 1925, made up his mind to obtain money by forgery from the local treasury and, to do it by forging Civil Court deposit payment cheques. He took the names of various local worthies likely to be known in the Treasury Office, he filled up certain blank forms, forged the signatures of the Civil Court clerk and of the Presiding Officer there and presented these payment cheques to the local treasury in the ordinary course, it appearing that he was a person entitled to draw money out of Court. The forgery was not detected; the documents appeared to be in order and the present accused does not come into the matter until we get to the stage at which the actual payments had to be made by the Poddar in the treasury. The person whose name had been forged as being the real payee could not, of course, be produced; but it appears that the Poddar was prepared to pay to some person nominated by the payee and to pay on getting proper indentification by a person who was known to him. The accused who is a *Mokhtear* went and identified a particular person as being Jyotish Chunder Banerji, the payee, named in the cheques. What is now said is that he may or may not be a party to the swindle; but that, assuming that he is not party to the swindle, he still can be convicted and should be convicted under ss. 182 and 420, Indian Penal Code. The only view of this matter that can reasonably be attributed to the Jury is, first of all, that the *Mokhtear* made the identification rashly or reprehensibly from want of reasonable caution that a man came to him, told him a yarn, persuaded him that he was Jyotish Chunder Banerji and that accordingly he went to the Poddar and identified the man as such. In a case of this sort one has to draw a

rigid line between two positions. If one is going to consider whether the man was in the swindle—a person taking part in a conspiracy by forgery to get money from the treasury, that is one position. The Judge and the Jury, have negatived that. If, however, we have to look to the question under ss. 182 and 420, Indian Penal Code, we are to do it on the basis that it cannot be imputed to him that he was in the swindle at all. Looking at it in that way, the question is what is the evidence, first of all, under s. 182, Indian Penal Code, that he has given to the Poddar information which he knows or believes to be false. The charge in this case perversed the section by saying as follows: "which you know or had reason to believe" and, in that respect, it is an entirely damnable charge. The evidence of the Poddar is to the effect that the statements actually made by the accused were two separate and distinct statements. One was that, when asked if he knew the payee Jyotish Chander Banerji, he said that he knew him. The other was that he pointed out the man who drew the money as Jyotish Chunder Banerji whom he knew. The Jury were, to my mind, right to reject the story of any such identification as that, splitting up the two questions whether the man was Jyotish Chander Banerji and whether the accused knew Jyotish Chander Banerji; but, assuming that such suggestion could be accepted on the evidence, it is also reasonably clear that the accused may well say that rashly or not, foolishly or not he did think that he knew Jyotish Chunder Banerji. He may be wrong; he had taken little pains to be right. But the question is whether he was honest. It has to be observed that, if he was not honest it is very difficult to see how the Judge and the Jury would acquit him of being in the swindle. As regards the charge under s. 420, Indian Penal Code, all that I can say is that, on this view of the facts of the case, I am at a loss to discover what s. 420 can have to do with this matter. For these reasons it appears to me that this Reference ought not to be accepted. Theaccused must, therefore, be acquitted and released. His bail-bond will be discharged.

Mukerji, J.—I agree.

A. N. A. *Reference rejected.*

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION No. 774 OF 1926.

October 11, 1926.

Present:—Mr. Justice Broadway.

GHULAB KHAN, DECEASED, THROUGH KARAM KHAN—COMPLAINANT—PETITIONER

versus

GHULAM MOHAMMAD KHAN AND OTHERS—RESPONDENTS.

Cr. P. C. (Act V of 1898), ss. 174, 202—Magistrate's power to hold enquiry—Duty of Magistrate to keep proceedings under two sections distinct.

A Magistrate is competent to hold an enquiry into a complaint of an offence under s. 202, Cr. P. C., to ascertain whether there is sufficient foundation to issue process against the person or persons complained against. But where proceedings under s. 174, Cr. P. C., have also been taken, they must be kept distinct from those taken on complaint. [p. 59, col. 2.]

Petition for revision of an order of the Sessions Judge, Attock at Cambellpore, dated the 30th November, 1925, affirming that of the Magistrate, First Class, Attock, dated the 23rd October, 1925.

Mr. *B. R. Puri*, for the Petitioner.

Mr. *Abdul Rashid*, Assistant Legal Remembrancer, for the Crown.

Messrs. *Shamair Chand* and *Din Dayal*, for the Respondents.

JUDGMENT.—On the 4th of August, 1925, three persons were murdered in the village of Dandi in the District of Attock. These murders were of a daring character and it is said that the persons responsible for them had intended to murder *Subedar* Ghulam Mohammad Khan as well. They had searched for him but the *Subedar* succeeded in hiding himself in his own house and thus escaped. The murderers were known and among them was one Gulab Khan son of Karam Khan. A guard of two constables was placed on *Subedar* Ghulam Mohammad Khan's house as Gulab Khan and his accomplices had absconded. On the 21st of August, 1925, it was rumoured that Gulab Khan and Nawab Khan absconders had returned to the village Dandi. Information of this fact was sent to the Police Station Pindigheb and steps taken to effect their arrest. During the night when it was said that Gulab Khan and Nawab Khan were sitting in the house of Gulab Khan's father Karam Khan, the Police went to the house but did not find Gulab Khan or Nawab Khan. On the following day, *i.e.*, the 22nd of August,

1925, search parties were formed to scour the country side for these two men. These parties consisted of three or four persons each and the *Subedar* was accompanied by the two constables who were joined later by one Fatta son of Nur Muhammad. Proceeding in their search the two constables separated going towards the west leaving the *Subedar*, who was armed with a revolver and Fatta to examine a small portion of the *bela*. While doing this the *Subedar* and Fatta took different paths. Fatta happened to catch sight of Gulab Khan sitting under a group of small *shisham* trees with a hatchet beside him. Fatta promptly retraced his steps and finding the *Subedar* standing at a little distance pointed in the direction whence he had come but refused to accompany the *Subedar* into the trees. Thereupon the *Subedar* started off, in the direction indicated by Fatta, by himself. According to the *Subedar* he had not proceeded far when all of a sudden he saw Gulab Khan flourishing a hatchet and coming towards him. Gulab Khan is said to have called out "O *Subedar* I was looking for you in heaven and I have found you on earth, now be ready." The *Subedar* seeing himself thus attacked by Gulab Khan promptly fired at him with his revolver and hit him six times. He says he only fired five shots, but according to the medical evidence there were six bullet wounds. The other people searching collected on hearing the sound of firing and Gulab Khan was picked up dead.

For some reasons or other the Police very negligently failed to report this matter in the proper manner to the Sub-Divisional Officer, Pindigheb. That Officer, however, came to know what had happened and sent a report of the occurrence to the District Magistrate which reached him on the 25th of August, 1925. The District Magistrate upon that suggested that proceedings under s. 174 of the Cr. P. C. should be taken in order to ascertain the circumstances in which Gulab Khan met his death. The Sub-Divisional Officer (Shah Nawaz Khan) thereupon instituted and carried out an inquest under s. 174 of the Cr. P. C. He examined the Doctor and other persons and also examined the *Subedar*.

On the 1st of September, 1925, Karam Khan had instituted a complaint against the *Subedar* and two other persons charging them with the murder of his son Gulab Khan. The complaint was sent to the Sub-Divisional Officer for disposal. Acting under s. 202 of the Cr. P. C., he proceeded to examine three witnesses tendered by Karam Khan but in the absence of the *Subedar* and the other persons accused. Having done this, on the 27th October, 1925, he proceeded to record what he calls a "verdict" in which he discusses the circumstances under which Gulab Khan met his death and finds that the *Subedar* acted in the exercise of his right of self-defence when he killed him. He then proceeds to consider in the same "verdict" or order the case as presented by Karam Khan, discusses the evidence of the three witnesses examined by him and then concludes as follows:—

"With these facts I hold that Gulab Khan was not killed when he was asleep. On the other hand he was killed when he made a preparation to assault and kill the *Subedar*. In other words my verdict is that the *Subedar* was justified in killing Gulab Khan and he has, therefore, committed no offence."

Although wrongly described as a 'verdict' this may be regarded as an order dismissing the complaint under s. 203 of the Cr. P. C. Treating it as such Karam Khan moved the Sessions Court on the revision side praying that the order of discharge be set aside and the present accused tried before a competent Court. This application was filed on the 25th November, 1925, and rejected by the learned Sessions Judge on the 30th November, 1925. Karam Khan then on the 6th of May, 1926, moved this Court under s. 439 of the Cr. P. C. objecting to the procedure adopted and praying that the order of discharge should be set aside.

Now a Magistrate is empowered to hold an enquiry into a complaint of an offence in order to ascertain whether there is sufficient foundation for it to issue process against the person or persons complained against. In the present case the Magistrate clearly acted in the exercise of these powers under s. 202, Cr. P. C. He allowed the complainant to produce such evidence in support of his complaint as he wished to produce, and after a consideration of that evidence came to the conclusion that that evidence was so wholly unworthy of credence as to warrant his taking no further action in the matter. Where the Magistrate erred in not keeping the proceedings under s. 174, Cr. P. C., more distinct from the proceedings taken on the complaint and

had less time elapsed before this Court was moved I might have considered it advisable to direct a fresh enquiry under s. 202, Cr. P. C.

As has been pointed out above, however, it will be seen that after the refusal of the learned Sessions Judge, on the 30th November, 1925, to interfere with the Magistrate's order no steps were taken till the 6th May, 1926, when this petition was presented. No doubt this lapse of time alone would not be necessarily sufficient to refuse to take action, but there are certain other considerations that cannot be ignored. The story set out in the complaint has been considered and has been disbelieved by the Magistrate. Indeed so strong a view was taken by the Magistrate that he did not consider it necessary to issue process to obtain the presence of the persons complained against in his Court. The story itself as set out is most unconvincing and it is clear that the deceased did not meet his death in the manner alleged by the complainant. The fact too that proceedings were taken properly under s. 174, Cr. P. C., cannot be lost sight of. After careful consideration of all the circumstances, therefore, I do not see that any good purpose would be served by re-opening this matter at this stage and I, therefore, decline to interfere and dismiss this petition.

R. L. *Petition dismissed.*

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 821 OF 1925.

December 21, 1925.

Present:—Mr. Justice Dalal and Mr. Justice Boys.

EMPEROR—PROSECUTOR

versus

BHIRGU SINGH—ACCUSED.

U. P. Land Revenue Act (III of 1901), s. 147—Penal Code (Act XLV of 1860), s. 174—Citation by Revenue Officer—Failure to attend, whether offence under s. 174, Penal Code.

The issue of a citation to an alleged defaulter under s. 147 of the U. P. Land Revenue Act does not involve him in any legal liability to attend, and consequently failure to attend in obedience to such citation is not an offence under s. 174, Penal Code. [p. 61, col. 2.]

Criminal appeal by the Local Government, from an order of acquittal passed by the Sessions Judge, Azamgarh, dated the 27th of July, 1925.

The Government Advocate, for the Crown.

Mr. *N. Upadhiya*, for the Accused.

JUDGMENT.—In this case one Bhirgu Singh was tried summarily by a Magistrate of the First Class and convicted under s. 174 of the Indian Penal Code. The offence alleged against him was that being legally bound to attend at a certain place and time in obedience to a summons, notice or order from a public servant he had intentionally omitted to attend. In this case the public servant who issued the direction to attend was a Tehsildar and the direction purports to have been issued under s. 147 of the Land Revenue Act. That section says that "when an arrear of revenue becomes due, a writ of demand calling on the defaulter to pay the amount within a time therein stated, or a citation to appear, may issue." It was alleged on behalf of the Crown that a citation had issued. A Tehsildar has power to issue the citation. The only question that arises in the case is whether the power to issue citation connotes a legal liability on the part of the person to whom the citation is issued to attend. The Board has framed a form which embodies both the writ of demand and the citation in one document.

It is in the following form :—

"Whereas a sum of Rs. on account of arrears of instalment in respect of is due against you, you are hereby directed (*hidayat*) that in case the entire arrears aforesaid and the process fee in respect of this summons are not paid immediately you should appear before this Court at on ." A foot-note to this document says that: "Failure to attend shall be punishable under s. 174 of the Indian Penal Code." The document is further headed "Summons requiring attendance" (in vernacular "Summon *hazri*)."

Two things may be noted about this document. The first is that by embodying the writ of demand and the citation in the same form the Board of Revenue in practice deprived themselves of the option of sending either a writ of demand or a citation, but if they have chosen to deprive themselves in practice of that option there is nothing illegal in their so doing.

The second point to be noted is that in two places the vernacular word used is "summon" and the foot-note declares omission to comply to be punishable under

s. 174 of the Indian Penal Code. To give full force to the use of the words "summons" and the foot-note would be to beg the question which we have to decide; and if omission to comply is not punishable by law a mere declaration in the form that it is punishable will clearly be wholly ineffective. That question is whether there is any different effect to be given to the use of the word "citation" in s. 147 and to the use of the word "summons." As we have said the Magistrate found the accused guilty under s. 174 of the Indian Penal Code. On appeal he was acquitted by the learned Sessions Judge and from that acquittal the Local Government has filed the present appeal. On behalf of the opposite party it has been pointed out to us that in the N. W. P. Act (Act XIX of 1873), s. 151 there was only a provision for the writ of demand. There was no power to issue either a citation or a summons. In the Oudh Act (XVII of 1876), s. 114, there was provision for a writ of demand or a "summons" to appear; while finally in the present Act III of 1901, s. 147, in which both the previous Acts are combined there is provision for a writ of demand or a "citation". It is not unreasonably urged that there must have been some good reason for the use of this word "citation" which did not appear in the N. W. P. Act or any other word of the like nature, and which did not appear in the Oudh Act in which the word "summons" was used. It can hardly be an accident and we cannot treat it as such. We are urged to give this word its ordinary meaning, that is, that it is rather in the nature of an invitation to appear than of an order to attend. We think that it is reasonably contended that its meaning is analogous to its meaning when used in the Probate and Succession Act where it amounts merely to an invitation to come and see the proceedings. Reference may be made to Act V of 1881, s. 69 (Probate and Administration Act) and the Succession Act, ss. 199 and 250. It is true that in testamentary matters where there are definite proceedings going on, invitation to come and see may well be issued to parties interested, while in the matter before us it might be said that there are no proceedings for anybody to come and see. But it does not appear to us unreasonable that Government should have contemplated the issue of a notice to an apparent defaulter inviting him to come and discuss the matter. There might be some question of dispute or uncertainty in regard to the amount due as shown by the account prepared under s. 145 of the Land Revenue Act. It might be possible that if the apparent defaulter went to see the Tehsildar some arrangement might be arrived at by which a delay in payment might be accepted. These are only two considerations that occur to us. It is quite possible that Government may have contemplated that in many cases immediate arrest might by negotiations be avoided. We think, therefore, that a meaning can properly be given to the word "citation" without attributing to it the full force of a "summons". It is further clear that if a person has been given an opportunity, even though he is not obliged to take advantage of that opportunity, of going to the authorities and discussing the matter and he refuses to take advantage of that opportunity, he can have nobody to blame but himself if the authorities proceed to the extremity of arresting him. Finally, there is drawn to our attention the provisions of s. 193 which expressly declare that a person who has received a "summons" to appear "shall be bound to attend." The Legislature can hardly have overlooked the fact that s. 147 provided for a citation to appear and if it had intended that an unnatural construction should be put upon the word "citation", namely, that it involved legal liability to attend it would naturally have inserted also the word "citation" in s. 193.

For these reasons we hold that the issue of a citation to an alleged defaulter under s. 147 of the Land Revenue Act does not involve him in any legal liability to attend, that the opposite party here was, therefore, not guilty of an offence punishable under s. 174, Indian Penal Code, and was rightly acquitted by the learned Sessions Judge. The appeal is, therefore, dismissed.

A. N. A. *Appeal dismissed.*

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 313 OF 1926.

August 13, 1926.

Present:—Mr. Justice Mukerji and Mr. Justice Roy.

SHAHABUDDIN AHMED—ACCUSED—PETITIONER

versus

ABDUL KADER AND OTHERS—OPPOSITE PARTY.

Cr. P. C. (Act V of 1898), s. 133—Public nuisance—Order for removal—Non-service of notice on some parties, effect of—Setting aside order, legality of—Costs of removal, liability for.

A Magistrate has no jurisdiction to cancel an order passed by his predecessor for removal of a nuisance under s. 133, Cr. P. C., on the ground that one of the parties to the proceedings had not been properly served with a notice or on the ground that the nuisance was in existence for a long time. [p. 62, col. 2.]

The question as to from which party or parties the costs for the removal of a nuisance should be recovered has to be determined upon a consideration of the question as to the parties upon whom the notices in connection with the proceedings were served, inasmuch as it will be unjust to make an order for recovery of costs from a party who was not actually served with any notice of the said proceedings. [p. 63, col. 1.]

Criminal revision against an order of the Sub-Divisional Magistrate, Munshigunj, dated the 4th January, 1926.

Babus *Suresh Chandra Talukdar* and *Mahendra Kumar Ghose*, for the Petitioner.

Messrs. *Monnier* and *Syed Nousher Ali*, for the Opposite Party.

JUDGMENT.—This Rule has been issued to show cause why the order passed by the Sub-Divisional Magistrate of Munshiganj on the 4th January, 1926, should not be set aside on ground Nos. 2 and 3 of the petition. It appears that proceedings under s. 133 of the Cr. P. C. were drawn up on the 4th March, 1925, by Mr. M. C. Ghose the then Sub-Divisional Magistrate of Munshiganj against nine persons who were named in the said proceedings. The proceedings related to the removal of an obstruction from what was alleged to be a *halat*. Notices of these proceedings were issued and it appears from the report of the serving peon that they were served upon 8 out of the 9 persons. The report runs to this effect: opposite-parties Nos. 1, 3, 4, 5, 7 and 8 although they were present at the time when the notices were tendered to them for service did not give any receipt and upon that the said notices were served by affixing them on some conspicuous part of their dwelling house; and as regards opposite parties Nos. 2 and 6 the report was to the effect that they were not present and that the notices were served on the persons who were in their joint family house. Whether his service was valid or not is a matter with which we are not concerned at the present moment. It appears further that thereafter the learned Sub-Divisional Magistrate, Mr. M. C. Ghose on the 4th April, 1925, apparently being of opinion that the service was sufficient, recorded the following order: "Second party absent. Report shows notices personally served. Rule made absolute. Ask Police to clear the obstruction." On the 19th December, 1925, one of the parties filed a petition before the Sub-Divisional Magistrate, Mr. R. B. Mukerji, who had in the meantime succeeded Mr. M. C. Ghose, alleging that the opposite party did not claim the plot of land on which the obstruction is alleged to have stood and that it was impossible to fill up the excavation and praying that orders might be passed on the first party to fill up the ditch at their own costs if they so desired. The learned Msgistrate thereupon on the 4th January, 1926, passed an order directing that the order previously passed as aforesaid for the removal of the obstruction should be withdrawn. This is the order which is complained of in this Rule. The ground upon which the Magistrate passed this order appears to have been that the ditch had been in existence for more than 30 years and that only one of the parties, namely, Abdul Kader who was a Sub-Inspector of the Bengal Police and was posted at Munshiganj had not evidently been served with any notice in connection with the proceedings under s. 133. In our opinion this ground did not give any jurisdiction to the learned Magistrate to pass the order cancelling the order made on the 4th April, 1925, to which we have already referred.

It has been contended on behalf of the opposite parties who have appeared in this Rule that none of them had been actually served with the notices that were issued in connection with the proceeding and a number of affidavits have been filed in this Court in order to establish that fact. While it is not possible for us to arrive at a definite finding as to whether these notices were actually served or not upon all the opposite parties it is quite clear to us that the learned Sub-Divisional Magistrate himself has not yet gone into this question. We are therefore, of opinion that the order direct,

ing the withdrawal of the previous order by which the obstruction was directed to be removed is a bad one and we accordingly set that order aside. The procedure to be followed now is clearly laid down in s. 140 of the Cr. P. C. Sub-section (2) says that if such act is not performed within the time fixed the Magistrate may cause it to be performed and may recover the costs of performing it either by the sale of any building, goods or other property removed by his order or by the distress and sale of any other moveable property of such person within or without the local limits of such Magistrates' jurisdiction and that if such other property is without such limits the order shall authorise its attachment and sale when endorsed by the Magistrate within the local limits of whose jurisdiction the property to be attached is found. The order of the 4th of April, 1925, is, in our opinion, good and a valid order and the obstruction against which that order is directed will have to be removed. When the question will arise from which party or parties the costs for the removal of the said obstruction will have to be recovered that question will have to be determined upon a consideration of the question as to the parties upon whom the notices in connection with the proceedings under s. 133 were served and it would obviously be unjust for the Magistrate to make an order for recovery of those costs from a party who was not actually served with any notice of the said proceedings.

For these reasons we are of opinion that the Rule should be made absolute, that the order directing the withdrawal of the previous order passed for the removal of the obstruction should be set aside and that all further questions that may arise in connection with these proceedings will have to be dealt with in the light of the observations which we have made.

Rule made absolute.

A. N. A.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 240 OF 1926.

June 9, 1926.

Present :—Justice Sir Cecil Henry Walsh, KT.

SUKHNANDAN LAL—ACCUSED—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 167—Framing false document—Sentence—Cr. P. C. (Act V of 1898) s. 439—Revision by accused—Enhancement of sentence—Single Judge, power of.

Any official however humble who deliberately tampers with official records and issues false copies, whatever his motives may be, deserves severe punishment, not merely for his own conduct but as a deterrent to others who may be tempted to follow his example. [p. 63, col. 2.]

A Single Judge dealing with an application for revision filed by an accused person under s. 439 of the Cr. P. C. has power to enhance the sentence passed upon the petitioner by the lower Court. [p. 64, col. 1.]

Criminal revision from an order of the Additional Sessions Judge, Cawnpore at Banda, dated the 29th March, 1926.

Mr. *Kumuda Prasad*, for the Applicant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—I am surprised at the judgment which the learned Sessions Judge has permitted himself to deliver in this case. In the first place, it is not disputed that the applicant before me is a public official charged by Government in the public interest to preserve Permanent Records of the Rights, and positions of parties and interests in land, in order that people may not be injured by false claims, and that there always may be a reliable record available for Courts of Justice; and whether or not he had any ulterior motive, nobody in this world can say, he did what he knew was wrong, and a breach of his duty to the Government, conduct which is constantly complained of in the case of *Patwaris*, and which causes untold trouble to poor people who are compelled to lose their rights because of the uncertainty and difficulty of establishing clear evidence. To my mind any official, however humble, who deliberately tampers with official records, and issues false copies, whatever his motives, deserves severe punishment, not merely for his own conduct, but as a deterrent to others who may be tempted to follow his example. In this case the Magistrate convicted the *Patwari*, and according to the view of the Sessions Judge rightly convicted him, and sentenced him to two terms of one year each to run concurrently, in addition to a small fine, with two months' additional imprisonment in lieu of the fine. In my opinion—and I am always ready to overlook offences committed by persons who yield to sudden temptation for the first time and to take a lenient view of their conduct—in the case of a *Patwari* found guilty of such conduct as this, a year's imprisonment is quite a reasonable sentence which no Court

ought to interfere with. The learned Judge has reduced it to three months. He has written a laboured judgment in portion of which I regret to find that he has rather gone out of his way to minimize the conduct of the *Patwari* in issuing false copies. I do not stop to consider whether the Sessions Judge is right in that view or not, but I take the opinion which he has formed and has expressed in other parts of his judgment. He finds that when the Munsif's attention was called to the discrepancy, and he, the Munsif, in the pursuance of his duty, rightly examined the *Patwari* and his papers and reported the matter to the Collector, the *Patwari* in the meantime interpolated another year in his copy of the *khasra*, and made a note that the *khasra* had been taken by the Munsif, and reported that the Government work of preparing annual records was suffering in consequence of the conduct of the Munsif. The learned Sessions Judge says: "I am of opinion that in order to save himself he kept back the *khasra* of 1332 *Fasli* and has not produced it." In other words the Sessions Judge is of opinion that in order to create greater difficulty, when his original conduct was complained of, this man was degraded enough to alter his official documents and make an improper complaint against the Munsif, which he knew to be unfounded. To my mind that is a grave and gross aggravation of his offence, and compels me to re-consider the whole matter, which I do, and in the interests of justice I restore the original sentence passed by the Magistrate, and set aside the reduction of the Sessions Judge, which he had no business to make. If the appellant has any objection to raise to my order, he can appeal to the Local Government. He must surrender to his bail and serve out his sentence.

It is objected that I cannot restore the sentence. I am satisfied that I have power to restore the original sentence and even to enhance it when an accused applies under s. 439. The section clearly provides it. The rule about a two Judge Bench only applies where the Court issues notice, of its own motion, or an application by some one else, to show cause why the sentence should not be enhanced. In this case the whole matter has been brought before me for revision by the accused himself, and I hold that I have power to restore the original sentence.

Revision rejected.

Z. K.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 43 OF 1926.
(CRIMINAL REVISION PETITION NO. 36 OF 1926.)

May 5, 1926.

Present:—Mr. Justice Wallace.

In re KAILE LAKSHMAYYA AND OTHERS—ACCUSED—PETITIONERS.

Cr. P. C. (Act V of 1898), s. 257—Process, issue of, at accused's instance to persons already examined as prosecution witnesses—Magistrate, power of, to refuse to allow cross-examination.

Section 257, Cr. P. C., allows an accused to summon witnesses for the purpose of cross-examination and the accused is not bound to state in his application for process whether he wants the witnesses for examination or for cross-examination. It is for the Magistrate to enquire into the accused's purpose, if he thinks the application is vexatious. [p. 64, col. 2; p. 65, col. 1.]

Where a Magistrate has issued such process at the instance of the accused, he is not afterwards entitled to refuse to allow cross-examination by the accused. [p. 65, col. 1.]

Petition, under ss. 435 and 439 of the Cr. P. C., 1898, praying the High Court to revise the judgment of the Court of the Sub-Divisional Magistrate, Gudivada, in Cr. A. Nos. 44 to 47, preferred against the judgment of the Court of the Stationary Sub-Magistrate, Gudivada, in C. C. No. 165 of 1925.

Mr. *Ch. Raghava Rao*, for the Petitioners.

Mr. *V. L. Ethiraj*, for the Public Prosecutor.

ORDER.—The main point taken is that the Magistrate having issued process under s. 257 of the Cr. P. C. to certain witnesses who had been already examined as prosecution witnesses and were evidently cited as defence witnesses for the purpose of further cross-examination was not entitled in law to refuse to allow the accused to cross-examine them. As the Magistrate issued process, I must take it that he did not consider that the application to summon those witnesses was vexatious. He may have refused cross-examination on the ground that the defence could not cross-examine witnesses summoned by the accused, but that is not clear.

Section 257 of the Cr. P. C. allows an accused to summon witnesses for the purpose of cross-examination and I do not read it as meaning that the accused must necessarily state in his application for process whether he wants the witnesses for examination or for cross-examination. It is for the Magistrate to enquire into the accused's purpose, if he thinks the appli-

cation may be vexatious. As he had issued the process I do not think the Magistrate was justified in refusing to allow the witnesses to be dealt with for the purpose for which accused wanted them to be summoned. He, therefore, committed what was at least an irregularity.

Now owing to a previous refusal to adjourn to allow cross-examination of the prosecution witnesses these witnesses were not cross-examined after the charge, and I cannot hold that the accused were not prejudiced by the Magistrate's irregularity in procedure.

The case is not a serious one and I do not think a re-trial is called for. Accused have probably already suffered sufficient punishment in the expenses of their defence and anxiety.

I set aside the conviction and sentence passed on them and direct that the fines, if paid, be refunded.

V. N. V. *Conviction set aside.*

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 1206 OF 1925.

May 18, 1926.

Present:—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice Jai Lal.

MUHAMMAD ASLAM KHAN—

ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Cr. P. C. (Act V of 1898), s. 288—Commitment—Evidence of prosecution taken in accused's presence—Accused unable to cross-examine—Subsequent cross-examination—Transfer to Sessions Court—Evidence, whether admissible in trial.

In an enquiry before commitment the witnesses for the prosecution were examined in a Hospital where the accused was lying. The accused declined to cross-examine the witnesses on the ground that he was unwell. The witnesses were again tendered for cross-examination and were cross-examined by the accused but the witnesses went back on their previous statements and supported the accused's statement:

Held, that the statements made by the witnesses on the first hearing were duly recorded within the meaning of s. 288, Cr. P. C., and such of them as were transferred to the record of the Sessions Judge could be treated as evidence in the trial. [p. 68, col. 2.]

Appeal from an order of the Sessions Judge, Lahore, dated the 23rd November, 1925.

Messrs. *C. Bewan Petman, Kishen Chand* and *Pindi Das Subharwal*, for the Appellant.

Mr. *Des Raj Sawhney*, for the Crown.

JUDGMENT.—The appellant, Mohammad Aslam, has been found guilty by the Sessions Judge of Lahore of an offence of murder for having caused injuries with revolver shots to one Muhammad Hussain on the 2nd of August, 1925, as a result of which the latter died in the Hospital on the 9th August. His appeal is before us, and we have also to consider the question of confirmation of the sentence of death passed upon him by the Sessions Judge. The case for the prosecution is as follows:

On the 30th July, 1925, the appellant's house was searched by Lala Sohan Lal, Excise Inspector of Lahore, on information given by Muhammad Hussain and another. The females of Muhammad Aslam's family lived in this house. As a result of the search 103 packets of cocaine were found in a *Dharmsala* which adjoins the house. These are alleged to have been traced to the possession of the appellant. Muhammad Aslam was consequently annoyed with Mohammed Hussain. On the 1st August the appellant went to the *baithak* of the deceased in Chauk Wazir Khan and asked him whether it was a fact that he had informed the Excise authorities against him. On receiving an answer in the affirmative he went away. The next day, *i. e.*, the 2nd August, 1925, the deceased was at his *baithak* about 10-45 when the appellant called him from the street and asked him to come down. The deceased was going down by the stairs when the appellant fired at him with a revolver. The deceased was hit and immediately turned back and ran up to his *baithak*, but was followed by the accused who fired more shots at the deceased hitting him at the back. Both reached the *baithak* where more shots were fired by the appellant. Barkat, Budhu, *alias* Budh Parkash, and Muhammad Hussain Sain were present at the *baithak* at that time. The fist two immediately ran down the stairs to the street, but Muhammad Hussain Sain remained behind. The deceased fell on the ground. The appellant then shot himself causing a wound on the right side of the chest $1\frac{1}{2}$ inch below the right nipple. Muhammad Hussain Sain grapled with him, snatched the revolver from his hand and threw it on the road in the Chauk. At this time both the appellant and Muhammad Hussain Sain were on the balcony facing the Chauk of Wazir Khan Mosque. The deceased in the meantime slipped out of the *baithak* and went and reported the incident at the Police Station. Several men, who have appeared as witnesses on behalf of the prosecution,

were attracted to the scene of the crime on hearing the noise of the revolver shots and saw Muhammad Hussain Sain grapple with the appellant, take the revolver from him and throw it down on the street. Muhammad Ashiq, constable of the Railway Police, happened to be passing near the locality; he went up to the *baithak* and found the appellant secured by Muhammad Hussain Sain. He went down to the Chauk picked up the revolver, returned to the *baithak* and took the appellant towards the Police Station. In the meantime two constables arrived from the Kotwali and took the appellant to the Police Station in a tonga. Khan Bahadur Mian Ghulam Rasul, Deputy Superintendent of Police, also arrived on the scene immediately afterwards, took charge of the revolver and also took Barkat, Muhammad Hussain Sain, Budh Parkash and Abdul Rahman with him to the *Thana* as they stated that they had witnessed the incident. The revolver contained five empty and one loaded cartridges. In the meantime Muhammad Hussain, the injured person, had been sent to the Hospital. Before going to the Hospital he, deceased, made the First Information Report at the Kotwali which was recorded at 11 A. M. and in which he briefly mentioned the above facts.

On the same day, at 11-45 A. M., his statement was recorded at the Hospital by Munshi Insha Ullah, a Magistrate of the Second Class, in which the deceased again stated the facts already mentioned. The case was investigated by the Honorary Deputy Superintendent of Police, Agha Khalik Dad Khan, and all the alleged eye-witnesses were examined at a very early stage of the investigation which was completed on the 5th August. Apparently the investigating officer suspected that attempts were being made on behalf of the appellant to win over the eye-witnesses. He, therefore, sent up the case for trial under s. 307 of the Indian Penal Code and requested Lala Shankar Das, Magistrate, First Class, to hold the trial in the Hospital where both the deceased and the accused were in-door patients. Consequently Lala Shankar Das went to the Hospital on the 5th August and in the presence of the appellant recorded the statements of the eight witnesses produced on behalf of the prosecution. These witnesses included Barkat, Chiragh Din, Miraj Din and others who all supported the story of the prosecution. The case then adjourned to the 12th of August for recording the statements of the remaining witnesses for the prosecution. In the meantime Muhammad Hussain, the injured person, died on the 9th August. The proceedings before the Magistrate were, therefore, continued as a judicial enquiry with a view to commit the accused for trial to the Court of the Sessions Judge.

It appears that on the 5th August the appellant declined to cross-examine the prosecution witnesses alleging that he was not in a proper condition to do so or to follow their evidence properly. These witnesses were, therefore, again tendered for cross-examination on the 12th August and were cross-examined on behalf of the appellant. They all went back on their previous statement and supported the version of the appellant. The remaining evidence for the prosecution was recorded and the appellant was committed for trial. Before the Sessions Judge all the eye-witnesses supported the version of the appellant. The statements made by Barkat, Chiragh Din and Miraj Din, were transferred under s. 288 of the Cr. P. C. to the Sessions file on the 16th November, 1925, but on an objection by the Counsel of the accused the Sessions Judge, by his order of the 17th November 1925, decided not to use the statements of the eight witnesses who were examined by Lala Shankar Das on the 5th August, 1925, as evidence in the case under s. 288 because in his opinion they had not been duly recorded. He, however, treated such statements as if they had been recorded by the Magistrate under s. 164 of the Cr. P. C., *i. e.*, for purposes of corroborating or contradicting the evidence of the witnesses given at the trial. Before us Counsel for the appellant strenuously contended that none of the statements made before Lala Shankar Das, on the 5th August could be used as evidence at the trial. Counsel for the Crown, on the other hand, sought to make use of all the statements under s. 288 of the Cr. P. C. We will discuss this aspect of the case later. At this stage it will be convenient to state the defence version of this incident.

The accused admitted at the trial that his house was raided by the Excise Officers on the 30th July, 1925, and that they entered into his *zenana* in his absence. He denied that he suspected Muhammad Hussain, the deceased, as the informer of the Excise Officers and added as follows:—

"I came to the shop of Muhammad Din, fruit seller, and intended to purchase mangoes from him. I was testing a mango and settling the price with him. Hussain Khan came as I was eating the mango. He exchanged salutations with me. He put his arm in my arm and told me to go with him, as he wanted to talk to me. He went upstairs to his *baithak* and I went with him. We sat in Barkat's *baithak*. He talked of a woman to me. There was a quarrel over it. He abused me first. I told him to take to senses; he had called me to his *baithak* like friend and was treating me in an indecent manner. He told me to keep quiet. I also abused him, as he did not refrain from abusing me. I gave him a slap. He got up and told me that he would knock out my Pathanship. He went out, I followed him. I stopped at the door. He turned. He had a pistol. Two other persons were sitting in the *baithak*. They too got up. He told them to keep back as he was about to shoot at me. I caught hold of his wrist and tried to wrench the pistol from him. He gave me a kick in my chest. My grip on his wrist was loosened a little and he fired a shot which struck me. After that I distorted his wrist with a redoubled force. Three or four shots were fired. I became unconscious and my grip was loosened. I do not know how Muhammad Hussain was shot."

The suggestion of the appellant, therefore, is that the deceased received his injuries when he, the appellant, was attempting to wrench the pistol from him. The question, therefore, that we have to determine is whether the deceased was assaulted by the appellant as alleged by him or whether it was the deceased who first assaulted the convict and shot him and then received the injuries when the latter grappled with him in order to deprive him of the possession of the pistol. It is necessary to remark that the number and nature of the injuries on the person of the deceased are important matters to be considered when determining the truth or otherwise of the two versions which are before us. The medical evidence shows that the deceased had one bullet wound mid auxilary line opposite the 8th rib, one bullet wound on the back left side of the chest opposite the 7th rib just to the left of the middle line, a superficial graze immediately below and internal to left nipple, and, lastly, a graze on the middle of inner side of right upper arm. In the opinion of the Doctor injury No. 1 must have been caused by a bullet shot from the side and injury No. 2 from a bullet shot from the back, and injuries Nos. 3 and 4 were caused by the same bullet. We are unable to understand how injury No. 2 could have been caused in the manner suggested by the appellant. It is further difficult to imagine how a person holding a pistol or a revolver in his right hand could cause injury No. 4 by a bullet when another person is twisting his arm and attempting to wrench the revolver from his hand. The injuries on the person of the deceased are, in our opinion, consistent with the statement of the deceased and inconsistent with that of the convict. It also appears from the evidence of Lieutenant Fitz Gerald, who was examined by the Sessions Judge as an expert that the weapon from which the bullets were fired at the deceased was within a foot of his body and that the weapon with which the bullet was fired on the convict was close up to the body. This evidence also lends a very strong corroboration to the prosecution case.

The direct evidence in this case consists of the statements of the eye-witnesses to the incident. As we have already observed, at the trial all these witnesses supported the defence theory, but the statements of three witnesses made before the Committing Magistrate were transferred to the Sessions file under s. 288 of the Cr. P. C. Those statements support the prosecution version. The Sessions Judge has held that they were not duly recorded, and, therefore, he has not relied upon them as evidence in the case. He has held that, when those statements were made, the appellant was too weak to be able to cross-examine the witnesses, that he was not warned that the trial was to commence on the 5th August, that he was not given time to obtain advice of the Counsel and, therefore, that he was not in a fit condition to understand what was going on. The Magistrate, Lala Shankar Das, was examined as a witness at the trial and he stated that he was satisfied that the appellant was in a fit condition to listen to the evidence of witnesses, otherwise he would not have proceeded with the trial. It appears that before the trial began the House Surgeon was asked by a Police Officer as to the condition of the appellant and stated that he (the accused) was "all right." It was after this that

the trial of the case began. The following appears in the evidence of the House Surgeon, Dr. Muhammad Nawaz:

"A man in plain clothes asked me how Muhammad Aslam was that day. I thought he was asking me in an official capacity. He asked me whether Muhammad Aslam could make a statement. I said he could. It was never told to me that Muhammad Aslam was to be tried. Had I known that eight witnesses were to be examined before him and that he was to be asked to cross-examine them on 5th August, I would have said that Muhammad Aslam was not in a condition to undergo that trial. Muhammad Aslam was in a very bad condition."

It is difficult to reconcile the first part of the statement with the last. In cross-examination this witness admitted that he saw Muhammad Aslam often after the 2nd August and never saw him unconscious and that if a witness had made a five minute statement Muhammad Aslam would have been in a position to cross-examine him. No request was made by the appellant for the postponement of the trial or for an opportunity to be given to him to engage a Counsel. Two or three of his friends were looking after him and were sitting close to him at the time of the trial. They did not make any such request. On the 12th of August, the next date of hearing of the case, the witnesses were cross-examined by the Counsel who had been engaged by the accused.

The learned Counsel for the appellant has cited the following cases in support of his contention that the statements of the witnesses were not duly taken by the Magistrate on the 5th August, 1925:

(*a*) *Queen-Empress* v. *Sagal Samba Sajao* (1). In this case the accused was not allowed by the Committing Magistrate to cross-examine the witnesses examined by him at the judicial inquiry prior to commitment, and it was held that such statements could not be deemed to have been duly taken.

(*b*) *Alimuddin* v. *Queen-Empress* (2). In this case the statements were made in the absence of the accused and it was, therefore, held that they could not be transferred to the Sessions file and read as evidence under s. 288 of the Cr. P. C.

(*c*) *Phanindra Nath Mitra* v. *Emperor* (3).

(1) 21 C. 642; 10 Ind. Dec. (N. S.) 1059.
(2) 23 C. 361; 12 Ind. Dec. (N. S.) 241.
(3) 1 Ind. Cas. 469: 36 C. 48; 12 C. W. N. 1014; 8 L. J. 221.

The accused was unrepresented by Counsel when the witnesses for the prosecution were examined and did not, therefore, cross-examine them. The Magistrate decided to commit him for trial to the High Court. Later an application was made for an opportunity to cross-examine the witnesses which was refused by the Magistrate. The High Court declined to quash the commitment holding that the accused had no right to cross-examine the witnesses at that stage. This authority appears to be against the contention of the appellant and supports the learned Public Prosecutor. In the case before us as we have already stated, an opportunity was given to cross-examine the witnesses on the 5th August but was not availed of and the witnesses were actually cross examined on the 12th of August.

Under the circumstances we are of opinion that the statements of the witnesses who were examined on the 5th August were duly recorded within the meaning of s. 285 of the Cr. P. C., and such of them as were transferred by the Sessions Judge to his record under that section can legally be treated as evidence in this case. We have already cited that the depositions of Barkat, Chiragh Din and Miraj Din were transferred to the Sessions file on the 16th November, and it was not until the 17th of November, that the trial Judge decided not to use them as evidence in the case. The statements of the remaining witnesses who were examined on the 5th August by the Committing Magistrate are on the record, but the Sessions Judge has not transferred them under s. 288, Cr. P. C. We are not disposed at this stage to interfere with the discretion exercised by the Sessions Judge in not transferring those statements though we consider that the reasons given by him were not correct. We also accede to the contention of the learned Counsel for the appellant that the statements of the three witnesses mentioned above should be transferred to the Sessions file in their entirety, that is to say, the examination-in-chief of the 5th of August as well as the cross-examination of the 12th of August.

Another contention raised on behalf of the appellant was that apart from the statement of Barkat made before the Committing Magistrate which was subsequently retracted and the statement of the deceased there was no evidence as to the existence of any motive on the part of

appellant to kill the deceased. It was contended that both these statements were inadmissible but we have already held that Barkat's statement is admissibe. As regards the statement of the deceased Muhammad Hussain it is contended that s. 32 (1) of the Indian Evidence Act is an exception to the general rule that evidence in all cases should be direct and should, therefore, be limited in its application to cases which are expressly covered by it and that it permits the admission of only that part of the statement of the deceased which relates to the cause of the death or to any of the circumstances of the transaction which resulted in his death. The argument of the learned Counsel is that the visit of the convict to the deceased on the 1st of August and the conversation between the two on that occasion as described in the following extract from the statement of the deceased made before the Magistrate on the 2nd of August did not relate to the circumstances of the transaction which resulted in his death:

"On Wednesday last I reported against Aslam for having cocaine in his possession. On Thursday Aslam was arrested. Yesterday at 4 P. M. Aslam came to me at my *baithak* in Chauk Wazir Khan and asked me "Have you given information against me." I replied 'yes, I have'. "At that time Sheikh Barkat Ali, harness maker was sitting with me. Aslam went away after sitting for 5 or 7 minutes."

The inference that the prosecution seek to draw from this statement is that Aslam had the knowledge that Muhammad Hussain was instrumental in having his house searched, resented the treatment meted out to him and desired to punish the informer. Now, so far as the fact of Muhammad Hussain having given information to the Excise authorities is concerned, it is established by the evidence of Lala Sohan Lal, Excise Inspector. But as to the appellant's knowledge of it there is no evidence beyond the statements of the deceased and Barkat. In view of our decision that Barkat's statement is admissible as evidence against the convict, we do not think it necessary to express any opinion as to the admissibility of this part of the statement of Muhammad Hussain. Moreover, under the circumstances, of the case the question of motive is not very material.

Another contention of the learned Counsel for the appellant is that five shots were fired from the revolver and that only three bullets have been accounted for, two in the person of the deceased and one in that of the appellant. The remaining two bullets should have been either in the stairs or in the room above where, according to the statement of Muhammad Hussain, deceased, more shots were fired by the convict. It is further urged that, if the story for the prosecution is true, there should have been marks on the walls, in the stairs or in the room above of the bullets which missed their aim and did not enter the body of either the appellant or the deceased. We observe that Lieutenant Fitz Gerald was definitely of opinion that at least one mark on the wall of the stairs was of a bullet fired from below and was a ricochet, *i. e*, a glancing shot. This mark is mentioned as No. 4 in the statement of the witness at page 35 of the printed paper-book. In our opinion the argument of the learned Counsel does not affect the case one way or the other because admittedly five shots were fired and three of the bullets have been accounted for. Whether some of the shots were fired in the stairs as alleged by the prosecution or all the shots were fired in the room above as alleged by the defence, it is clear that only three bullets have been found and that the remaining two have not been traced. The disappearance of the two bullets is consistent with either theory. Lieutenant Fitz Gerald states that "the bullet that may have made mark No. 4 might have broken up into fragments if it hit a further obstruction or it may have disappeared through the staircase window. A ricocheting bullet takes a very erratic flight." Thus the fact that two of the bullets have not been discovered does not militate against the prosecution version.

One significant circumstance in the case is that all those who immediately arrived at the scene of the crime noticed that the appellant was in a more serious condition than the deceased, still he and not the deceased was mentioned by them to be the offender. It is difficult to believe Muhammad Hussain Sain when he says that though he saw the deceased shooting the appellant, yet he grappled with the appellant, wrenched the pistol from his hand, threw it into the *bazar* and kept him under arrest till the arrival of help. The conduct of this witness is a clear indication of the fact that it was the appellant who shot the deceased and then

attempted to kill himself. No reason whatsoever has been shown why the Police and all the eye-witnesses should have immediately accused the appellant as the murderer and tried to screen the deceased if the latter was really the guilty person. The statement of Ata Muhammad, constable, to the effect that he met the convict in the street, had some conversation with him and went a few paces before he heard a pistol shot and saw smoke coming out of a window corroborates the prosecution version and belies the version of the accused that after bargaining for mangoes he went to the *baithak* of the deceased at his invitation, talked with him about a woman and then had a quarrel as a result of which the deceased went in, brought the pistol and shot him. All this must have taken considerably more time than the interval between Ata Muhammad separating from the prisoner and hearing the pistol shots.

On a careful consideration of the whole case the conclusions are that the statements of the witnesses were duly taken by Lala Shankar Das, the Committing Magistrate, on the 5th of August and the 12th of August; that the depositions of Barkat, Chiragh Din and Miraj Din were duly transferred to the Sessions file under s 288 of the Cr. P. C., and are, therefore, evidence in this case; that the depositions made on the 5th of August contain the true version of the affair corroborated as they are by the dying declaration of the deceased by the medical evidence and the evidence of Lieutenant Fitz Gerald; that the statements made by these witnesses subsequently in cross-examination and at the trial were false and were probably due to the fact that they had been won over; and that the motive for the crime as alleged by the prosecution is proved by the statement of Barkat.

We are further of opinion that even if the statements of Barkat, Chiragh Din and Miraj Din are excluded and that that part of the statement of the deceased which relates to the visit of the appellant to him on the 1st July, 1925, is held to be inadmissible still there is sufficient evidence on the record to establish the guilt of the convict. His own statement and the remaining statement of the deceased read with the evidence of Lieutenant Fitz Gerald as to the distance from which the respective injuries on the persons of both were caused coupled with the medical evidence as to the nature and location of the injuries on each and the circumstances already mentioned establish, in our opinion, the case for the prosecution.

We feel no doubt as to the guilt of the appellant and uphold the conviction under s. 302 of the Indian Penal Code. The case is one of a deliberate murder and the only appropriate sentence to the culprit is that of death. We accordingly confirm the sentence and dismiss the appeal.

A. N. A. *Appeal dismissed.*

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION No. 1091 OF 1926.

October 29, 1926.

Present:—Sir Shadi Lal, KT., Chief Justice.

RAHM GHANI—ACCUSED—PETITIONER

versus

FAZAL ELAHI—COMPLAINANT—RESPONDENT.

Cr. P. C. (Act V of 1898), s. 528—Transfer of case by District Magistrate—Absence of notice to opposite party, effect of.

A transfer of a case by a District Magistrate without notice to the opposite party though not proper is not illegal.

Petition for revision of the order of the District Magistrate, Gujrat, dated the 26th June, 1926.

Mr. *Zaffrullah Khan*, for the Petitioner.

Mr. *M. L. Puri*, for the Respondent.

JUDGMENT.—While I consider that the order of transfer should not have been made without giving notice to the opposite party, I am not prepared to hold that such an order is illegal. I have heard the arguments advanced on both sides and do not see any adequate ground for quashing the order passed by the District Magistrate. I, however, direct the Magistrate to try the case, not in a summary way, but in accordance with the ordinary procedure.

R. L. *Petition dismissed.*

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 404 OF 1926.

October 4, 1926.

Present:—Mr. Justice Banerji.

RAM DAYAL GUPTA—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

U. P. Prevention of Adulteration Act (VI of 1912), s. 5—'Adulteration', meaning of—Certificate that ghi *was 'adulterated', sufficiency of.*

The word 'adulterated' when used with reference to *ghi*, necessarily means that the *ghi* contains an article which was used to debase it and which, therefore, could not have been derived from milk at all.

Criminal revision from an order of the Sessions Judge, Allahabad, dated the 23rd March, 1926.

Messrs. *Nehal Chand* and *Hazari Lal Kapoor*, for the Applicant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—Two points have been taken in this revision. One is that the certificate of the Government Public Analyst does not bring the article, which was taken possession by the Medical Officer of Health of Allahabad, within the Prevention of Adulteration Act (U. P. Act VI of 1912), and the second point is that the petitioner keeps *ghi* of two qualities and he had supplied the second quality to the Medical Officer of Health.

The facts are that the petitioner is a dealer in *ghi* in the town of Allahabad. The Medical Officer of Health took two samples of *ghi* which this man sells, and one of these samples was duly seized and sent to the Public Analyst to Government to test. The Analyst says:—"The sample of *ghi* contained a large portion of an ingredient foreign to pure *ghi* and the sample was grossly adulterated."

It is argued by the learned Counsel for the petitioner that the article supplied to the Medical Officer of Health cannot be said to contain any substance not exclusively derived from milk, and unless the Court comes to that conclusion his client cannot be convicted under the Act. I am of opinion that the certificate of the Public Analyst does bring the case within s. 5 as in my opinion the use of the word "adulterated" necessarily means that the sample of *ghi* sent to the Public Analyst contained an article which was used to debase the *ghi* and, therefore, could not have been derived from milk at all.

As regards the second point raised the evidence of the Medical Officer of Health is clear. I am, therefore, of opinion that there is no force in this application and I dismiss it.

A. N. A. *Revision dismissed.*

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 291 OF 1926.

June 7, 1926.

Present:—Mr. Justice Jai Lal and Mr. Justice Dalip Singh.

WARYAM SINGH—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

*Penal Code (Act XLV of 1860), ss. 79, 302, 304, 304A—Death caused under mistake of fact—*Bona fide *belief that murdered person was a ghost—Accused, criminal liability of—*Mens rea*—Confessions to be read as a whole.*

Where a person believing in good faith that the object of his assault was not a human being but a ghost, caused fatal injuries on another which resulted in the death of the latter:

Held, that in view of the provisions of s. 79 of the Penal Code, the accused was not guilty of murder or culpable homicide or even of an offence under s. 304A of the Penal Code. [p. 75, col. 1.]

A confession or statement of an accused must be read and accepted as a whole unless there is evidence to contradict any portion thereof. [p. 73, col. 1.]

Criminal appeal from an order of the Sessions Judge, Gujranwala, dated the 2nd March, 1926.

Mr. *Kidar Nath Chopra*, for the Appellant.

Mr. *Abdul Rashid*, for the Respondent.

JUDGMENT.—The appellant Waryam Singh has been convicted by the Sessions Judge of Gujranwala under s. 302 of the Indian Penal Code and has been sentenced to transportation for life.

It is alleged that Waryam Singh had three children who all died during their infancy. The last child, a boy, died on the 7th of November, 1925. It was suggested to his wife, *Musammat* Radhi, that if she wanted her future children to live she should go and bathe on the tomb of her child who had recently been burried in the cremation ground. Consequently both husband and wife went to the cremation ground on the night of the 8th of November with an earthen vessel full of water. It was a dark night. *Musammat* Radhi took off her clothes and sat on the tomb of her child and the appellant began to pour

water on her. The deceased Phagga Singh appeared on the scene and the appellant attacked him with a stick causing him ten injuries, four of which were on the head, three on the shoulder and three on the hand. As a result of these injuries Phagga Singh died in the Hospital on the 12th of November. After causing the injuries to the deceased the appellant and his wife ran back to the village. *Musammat* Radhi states that she was frightened and, therefore, she left after two blows had been given by her husband to the object of his attack which they both took to be a ghost. It is, however, clear that they both reached the village together as they were seen by Sundar Singh going hastily towards the village and on enquiry had informed him that they had killed a ghost. It also appears from the statement of the accused that he met Ajit Singh and Uggar Singh in the way and on an enquiry by them made the same statement and that later both these men and the appellant went back to the cremation ground to see the ghost, and there discovered that it was Phagga Singh who had been beaten and who had been seriously injured and was lying senseless on the spot. They removed and left him near a pond. Later the appellant met Sundar Singh again and told him that it was Phagga Singh whom he had beaten during the night. Sundar Singh went and informed Teja Singh a brother of the deceased, who brought him to the village, took him to the Hospital and reported the matter at the *Thana*.

The above facts are established by the statement of *Musammat* Radhi, Sundar Singh, Teja Singh, the Civil Surgeon and the statement of the appellant himself. It is proved that the appellant on the very first occasion mentioned that he had killed a ghost. The only point on which the prosecution version differs from that of the appellant is that according to the prosecution, the convict knew at the time of the beating that it was Phagga Singh who was the object of his attack. The version of the appellant on the other hand is that he thought it was a ghost, and that it was later when he went to the cremation ground with Ajit Singh and Ujagar Singh that he discovered that it was Phagga Singh whom he had beaten. Ajit Singh and Ujagar Singh have not been produced as witnesses in this case. It is likely that if produced they would not have supported the accused owing to his allegation that they assisted him in removing Phagga Singh from the cremation ground to the pond.

In her deposition at the trial *Musammat* Radhi did not first make any mention of this second visit to the cremation ground, but the Public Prosecutor confronted her with her statement before the Committing Magistrate where she had mentioned this fact. Her statement before the Committing Magistrate was transferred to the Sessions file. The appellant, when questioned by the Committing Magistrate, mentioned this visit and in this he is corroborated by Sundar Singh who states that first the appellant told him that he killed a ghost, but later he told him that he had killed Phagga Singh. Sundar Singh does not definitely state how much time passed between the first and second statement to him, but it appears that the latter was early in the morning and therefore, after a considerable time after his first meeting with the appellant and his wife. It is to be observed that the only direct evidence of the incident consists of the statement of *Musammat* Radhi and the appellant and both state that they thought it was a ghost, that had appeared on the scene and who was beaten by Waryam Singh, and having regard to the 'ghostly' nature of the object that had taken both to the cremation ground and the prevalent superstition that ghosts generally visit the cremation grounds on dark night and specially when people go there on unnatural missions, we are of opinion that this is the more probable version of the incident.

It may be mentioned that *Musammat* Radhi stated that the ghost gave a blow with a stick to Waryam Singh on his arrival. We are not prepared to believe this part of her statement. It is not corroborated by the medical evidence and no stick was found either at the scene of the assault or where the deceased was found by his relations the next morning. The learned Sessions Judge is of opinion that even if the appellant made a mistake of fact in believing that Phagga Singh was a ghost and not a human being it cannot be said to have been made in good 'faith' in face of the indisputable fact that the accused gave a merciless beating to the deceased which proved fatal.

We are, however, of opinion that the accused acted in 'good faith' as that term is defined in the Indian Penal Code and are not able to endorse the view of the learned Sessions Judge when he holds that the

accused cannot plead a 'mistake of fact' because he had no facts whereon to build his honest belief as required by law. The question of good faith has to be determined in the light of all the surrounding circumstances; these clearly lead to the inference that the convict had no reason to think that a human being would arrive or had arrived on the scene at such a time and place and that he probably thought that a ghost had actually appeared. He would be predisposed to expect a ghost and his natural impression would be that one had appeared. It was contended before us on behalf of the Crown that the *factum* of assault having been admitted by the appellant the burden of proving the existence of circumstances which exonerated him from punishment, lay on him. This as an abstract proposition of the law is true, but it was not necessary for the appellant to produce independent evidence to establish his plea. He is entitled to rely upon the evidence which has been produced on behalf of the prosecution and to urge that such evidence establishes his plea. Moreover it has repeatedly been held that a confession or statement of an accused person must be read and accepted as a whole unless there is evidence to contradict any portion thereof in which case such portion may be rejected. In the case before us whatever evidence there is on the record fully supports the statement of the accused. It is not proved, indeed it is not suggested that the appellant had any motive for doing an injury to the deceased. We are, therefore, of opinion that it has been established that at the time when he beat Phagga Singh the appellant believed him to be a ghost and that it was later after his visit to the spot in the company of Ajit Singh and Ujagar Singh that he discovered that it was Phagga Singh whom he had beaten. It is on these facts that we have to determine the guilt or otherwise of the appellant.

Counsel for the appellant relied upon s. 79 of the Indian Penal Code which provides that nothing is an offence which is done by any person who by reason of a mistake of fact in good faith believes him to be justified by law in doing it. It was rightly contended that this exception fully covers the case of the convict. The following cases were cited by the learned Counsel on both sides:

In re Gour Gobindo Thakoor (1). In that case the deceased was knocked down by a blow behind the ear and then hung up by the prisoners to a tree where he was found dead. The Magistrate convicted one of the prisoners of voluntarily causing hurt and the other of abetting the same. The conviction was quashed with a view to commitment of the persons implicated to the Sessions. In the course of the judgment the following remark was made by one of the learned Judges:

"Suppose that the Thakurs had no intention of killing the deceased, but, finding him insensible, without enquiry whether he was dead or alive, or giving him time to recover, under an impression that he was dead, hung him to the tree, and thereby killed him. It appears to me that they might all have been put on their trial, under s. 304, for culpable homicide not amounting to murder."

With great respect we venture to doubt the correctness of this view. The learned Judges appear to have ignored the fact that *mens rea* or guilty intention or knowledge necessary for a conviction for culpable homicide did not exist in the case before them. Moreover, the remark appears to be in the nature of an *obiter dictum* as the learned Judges did not finally decide the point. In any case the facts of that case are distinguishable from those of the present one. There the convicts knew that they were dealing with a human being. They had actually beaten him; whether or not under the circumstances they should have exercised more care and caution before hanging him to the tree was a question that necessarily arose on the facts disclosed. In the present case the appellant believed that a ghost had appeared and it is not reasonable to expect him to exercise the same care and attention as under ordinary circumstances.

Queen-Empress v. *Kangla* (2). In which under the circumstances and for the reasons almost similar to those in the last mentioned case it was held that the accused was punishable under s. 304 of the Indian Penal Code. Our remarks about the case of *In re Gour Gobindo Thakoor* (1) apply *mutatis mutandis* to this case also.

Queen-Empress v. *Khandu* (3). It was found the accused struck the deceased three blows on the head with a stick, with the intention of killing him. The deceased fell down senseless on the ground. The accused,

(1) 6 W. R. Cr. 55.

(2) A. W. N. (1898) 163.

(3) 15 B. 194; 8 Ind. Dec. (N. S.) 131.

believing that he was dead, set fire to the hut in which he was lying, with a view to remove all evidence of the crime. It was proved that the blows were not the cause of the death but the injuries from burning. It was held by a majority of the Judges that the accused was guilty of attempt to murder. One learned Judge was of opinion that the accused was guilty of murder under s. 302 of the Indian Penal Code. That case is also to be distinguished from the present one owing to the knowledge of the assailants that the object of the assault was a human being and to the existence of the initial intention to kill the deceased.

Emperor v. *Dalu Sardar* (4). In this case the accused assaulted his wife and gave her kicks, blows and slaps. The woman fell down and became unconscious. In order to create an appearance that the woman had committed suicide, the accused took up her unconscious body, thinking it to be a dead body and hung it by a rope. The death was found to be due to hanging. It was held that the accused could not be convicted of murder but of an offence under s. 325 of the Indian Penal Code for having given the deceased kicks, blows and slaps before she fell down on the grouud that the convict could not have intended to kill the deceased if he thought that the woman was already dead.

Palani Goundan v. *Emperor* (5). In this case the accused struck his wife a blow on her head with a ploughshare which rendered her unconscious. The accused believing her to be dead in order to lay the foundation of a false defence of suicide by hanging, hanged her on a beam by a rope and thereby caused her death by the strangulation. A Full Bench of the Madras High Court held that the accused was not guilty of either murder or culpable homicide not amounting to murder. The *ratio decidendi* in the case was that 'causing death' means 'puting an end to human life' and that the intention of the accused must be directed either deliberately to putting an end to a human life or to some act which to the knowledge of the accused is likely to eventuate, in the putting an end to human life, and further that the knowledge must have reference to the particular circumstances in which the accused is placed. An illustration is given in the judgment that if a man kills another by shooting at what he believes to be a third person whom he intends to kill, but which is in fact the stump of a tree, it is clear that he would be guilty of culpable homicide, because, though he had no criminal intention towards any human being actually in existence, he had such an intention towards what he believed to be a living human being. The learned Judges also remarked that a man is not guilty of culpable homicide if his intention was directed only to what he believed to be a lifeless body. In our opinion if a man kills another by shooting at what he believes to be say a beast or a stump of a tree he would not be guilty of culpable homicide. He had no intention of killing any body. Whether under the circumstances he would be guilty under s. 304A of the Indian Penal Code is a matter which must depend on the facts of each case.

Empress v. *Hayat* (6). The facts of this case come nearest to those of the case before us. The prisoner entertained a belief that a stooping child whom he caught sight of in the early glooming was a spirit or demon, the child being in a place which the prisoner and his fellow villagers deemed to be haunted, and acting on this belief caused his death by blows he inflicted before he discovered his mistake. No other motive for the assault had been proved. The Sessions Judge was of opinion that s. 79 of Indian Penal Code did not apply to the case. The learned Judges of the Punjab Chief Court gave the following opinion:

"Now, as he (the Sessions Judge) finds the prisoner was under a distinct mistake of fact, believing, that is, that his blows were aimed at a spirit and not at a human being, we can only explain this finding by assuming that the Judge must have meant that the prisoner did not in good faith, that is, 'with due care and attention' (s. 52, Indian Penal Code) believe himself justified in doing the act. If this be what the Sessions Judge meant, when negativing s. 79, Indian Penal Code, we are not prepared to differ from him, and we on this ground decline to interfere."

The convict, it may be mentioned, has been convicted under s. 304A of the Indian Penal Code. It would be observed that the

(4) 26 Ind. Cas. 157; 18 C. W. N. 1279; 15 Cr. L. J. 777.

(5) 51 Ind. Cas. 164; 42 M. 547; 20 Cr. L. J. 404; 37 M. L. J. 17; (1919) M. W. N. 340; 10 L. W. 45; 26 M. L. T. 68.

(6) 11 P. R. 1888 Cr.

judgment of the learned Judges proceeds on the hypothesis that the convict did not act in good faith. The decision of the case, therefore, turned on the peculiar facts found therein. But for the finding that the convict acted without care and attention he would have been acquitted.

An examination of the cases cited above shows that the better judicial opinion is that if the accused believed in good faith at the time of the assault that the object of his assault was not a living human being but a ghost or some object other than a living human being then he cannot be convicted of an offence under s. 302 or s. 304 of the Indian Penal Code. The ground for such opinion is that *mens rea* or an intention to do wrong or to commit an offence does not exist in such a case and that the object of 'culpable homicide' can be a 'living human being' only. We are, therefore, of opinion that on the facts found by us the appellant could not, having regard to s. 71 of the Indian Penal Code, be convicted under s. 302 of the Indian Penal Code or even under s. 304. We are further of opinion that s. 304A of the Indian Penal Code does not apply to the facts of this case because the circumstances under which the appellant was placed do not lead to the conclusion that he acted rashly or negligently, on the other hand they negative any such idea.

We accept this appeal, set aside the conviction of Waryam Singh and order his release forthwith.

A. N. A. *Appeal accepted.*

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 680 OF 1926.

October 26, 1926.

Present:—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice Agha Haidar.

DALIP SINGH—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal trial—Evidence of witness at enmity with accused as basis for conviction—Corroboration, sufficiency of.

It is unsafe to base a conviction on the testimony of persons who are at enmity with the accused unless it is supported by the evidence of reliable and disinterested witnesses. The statement of a witness who is a *sepi* in the village, whose name was not mentioned in the First Information Report and whose statement was not recorded by the Police until after the expiry of some days is not sufficient corroboration. [p. 76, col. 1.]

Appeal from an order of the Additional Sessions Judge, Lahore, dated the 3rd June, 1926.

Mr. *L. Saunders*, for the Appellant.

Diwan *Ram Lal*, Assistant Legal Remembrancer, for the Respondent.

JUDGMENT.—On the morning of the 7th September, 1925, one Narain Singh, a *Jat* of the village Bughiana Kalan in the District of Lahore, was subject to a brutal assault; in the course which he sustained no less than 18 wounds, one-half of which were incised injuries. The unfortunate man succumbed to his wounds shortly after the assault. Two other persons, namely, Bahali Ram and his brother Ram Lal, who were partners in cultivation with Narain Singh, were also wounded; Bahali Ram had four contused wounds, one of which had broken his jaw-bone, and Ram Lal sustained a bruise on one arm and abrasion on the other.

Four persons, namely, Dalip Singh, Shingara Singh, Hira Singh and Bahal Singh have been convicted of the murder of Narain Singh, and have been sentenced each to suffer the penalty of death. There can be no doubt that there was bad blood between the deceased Narain Singh, and his partners on the one side, and Dalip Singh and his followers on the other; and that only a week before the incident in question a fight had taken place, in which Narain Singh and his two comrades were accused of having caused serious injuries to Dalip Singh's brother Kapur Singh, with the result that, on the 2nd September, 1925. Kapur Singh lodged complaint against his three assailants.

As to what took place on the morning of the 7th September, there are two rival versions. The story for the prosecution is to the effect that Narain Singh along with Bahali Ram and Ram Lal was sitting on that morning outside his cattle-house about a mile from the village, when they were suddenly attacked by a large number of persons who were armed with *dangs* and *chhavis*. Ram Lal himself ran away on receiving the first blow, but Narain Singh and Bahali Ram were beaten severely. After inflicting a large number of blows upon both these persons, the assailants untied the cattle of the victims and drove them into the field of Jawala Singh, a

collateral of Dalip Singh ; and they took to that place also the dying man Narain Singh and his companion Bahali Ram. Dalip Singh subsequently drove the cattle from the field to the Punitive Police Post in the village in order to support the defence version that a fight had taken place between him and Narain Singh over cattle trespass. Now, there is sufficient evidence on the record to show that Narain Singh and his partners were beaten, while they were sitting near their cattle enclosure. If there were any doubt on the subject, it has been set at rest by the fact that while blood-stained earth was found near *haveli* (cattle-house), no mark of blood was discovered in the field of Jawala Singh; and it is obvious that blood-stained earth should have been found in that field, if it had been the scene of the tragedy.

We have, therefore, no hesitation in rejecting the theory as to the fight having taken place in the field of Jawala Singh over cattle trespass, and in holding that Narain Singh and his partners received their injuries, while they were sitting outside their *haveli*.

[Their Lordships after discussing the evidence against Dalip Singh came to the conclusion that the case against him had been proved beyond doubt and proceeded as follows:—]

The case of the remaining three appellants stands, however, on different footing. Their conviction rests upon the evidence of the two brothers, Ram Lal and Bahali and a witness called Jaggi. The first two witnesses were undoubtedly present at the time of the tragedy but they have bitter enmity with the convicts. It would, therefore, be unsafe to base the conviction upon their testimony, unless it is supported by the evidence of reliable and disinterested witnesses. Jaggi is the only corroborating witness relied upon by the learned Sessions Judge, but we find that his name was not mentioned in the First Information Report lodged by Ram Lal at the Police Station on the 7th September, and that his statement was not recorded by the Police until after the expiry of six days. In these circumstances we are not prepared to attach any importance to the evidence of Jaggi, who being a *sepi* in the village could easily be induced to repeat the story which had found favour with the Police.

We have bestowed our careful consideration upon the evidence relied upon by the prosecution, and, while we are of opinion that Narain Singh was assaulted by more than one person, we are not prepared to hold that the guilt of Singara Singh, Hira Singh and Bahal Singh has been established beyond reasonable doubt. Giving them the benefit of the doubt we accept their appeals, and setting aside their conviction we direct that they be released forthwith.

The appeal preferred by Dalip Singh is dismissed.

R. L. *Appeal dismissed.*

BOMBAY HIGH COURT.

CRIMINAL REFERENCE No. 65 OF 1926.

September 1, 1926.

Present:—Justice Sir Lallubhai Shah, KT., and Mr. Justice Percival.

EMPEROR—PROSECUTOR

versus

LAXMAN *alias* BABU BALOBA SHINDE—ACCUSED.

Cr. P. C. (Act V of 1898), s. 181 (2)—Criminal misappropriation and breach of trust—Property received innocently within jurisdiction of one Court—Offence committed at another place—Trial of offence—Jurisdiction of former Court.

In view of the specific provisions contained in s. 181 (2) of the Cr. P. C. with regard to the jurisdiction of Courts to try the offences of criminal misappropriation and criminal breach of trust, a Court within whose jurisdiction the property which is the subject-matter of the offence was received or retained, has jurisdiction to try such offences even though the actual offence is committed outside its limits. [p. 77, col. 2.]

Even if property is received quite properly and innocently at one place and is subsequently dealt with at another place dishonestly by the accused, he can be tried at the place where he received or retained the property. [*ibid.*]

Criminal Reference made by the Acting District Magistrate, Poona.

Mr. *P. B. Shingne*, Acting Government Pleader, for the Crown.

JUDGMENT.—This is a reference by the District Magistrate of Poona in respect of an order made by the First Class Magistrate of Poona discharging the accused on the ground that that Court had no jurisdiction to try the case. It may be mentioned that on this reference a Rule was issued to the accused, but there is no appearance on behalf of the accused. The Government Pleader has appeared in support of the reference, and we have heard him. We have considered the point arising on the facts which are briefly these.

The case for the prosecution was that the accused hired a cycle at Poona on June 11, 1925, for six hours, but, instead of returning the same in accordance with his written contract, he took it out to Yeola, in the Nasik District, and deposited it with one Damu Namdeo Sali as a security for an advance of Rs. 6. On these allegations the accused was charged with criminal breach of trust punishable under s. 406, Indian Penal Code.

The learned Magistrate held that he had no jurisdiction and he gave the following reasons:—

"It is clear that the actual disposal was effected at Yeola in Nasik District. With the nature of the disposal I am not now concerned. The important question is whether any Poona Magistrate has jurisdiction to try the case simply because the contract for hire was made in the Poona City."

After referring to s. 181 (2), Cr. P. C., the learned Magistrate observes:—

"In my humble opinion no Poona Magistrate has jurisdiction and the case must be tried at Yeola."

Accordingly, he made an order discharging the accused, leaving it to the authorities or the party concerned to file a complaint, if so advised, at the place where the property was said to have been dishonestly disposed of. S. 181, sub-s (2), provides:—

"The offence of criminal misappropriation or of criminal breach of trust may be inquired into or tried by a Court within the local limits of whose jurisdiction any part of the property which is the subject of the offence was received or retained by the accused person, or the offence was committed."

This is a specific provision with regard to these two classes of offence and the Code gives jurisdiction not only to the Court where the offence was committed, but also to the Court within whose jurisdiction the property which is the subject of the offence was received or retained by the accused person. The learned Magistrate says:—

"There is authority of more than one High Court ruling referred to in the commentaries to the Cr. P. C. in support of my contention that I have not jurisdiction."

He has not expressly referred to any cases; so we are not in a position to deal with the cases which the Magistrate might have in view. But some of the cases which possibly the learned Magistrate had in view have been referred to by the learned Government Pleader. We do not think, however, that these reported cases afford any answer to the wording of s. 181, sub-s. (2). It is not essential, under s. 181, sub-s. (2), that at the time the property is said to be received or retained by the accused person he must have a dishonest intention to misappropriate it or to commit criminal breach of trust with reference to it. It is enough for the purposes of the section if the property which is the subject of the offence was received or retained by the accused at a particular place to give jurisdiction to the Magistrate of that place to try the case.

It may be said that, even if the property was received quite properly and innocently, at one place, and was subsequently dealt with at another place dishonestly by the accused so as to constitute a criminal misappropriation or a criminal breach of trust, under the wording of the section he would be triable at the place where he received or retained the property. No reported case has been brought to our notice, which can be said to conflict with this view. Out of the cases cited to us it is sufficient to refer to *Assistant Sessions Judge of North Arcot* v. *Ramaswami Asari* (1) and *Ramratan Chunilal* v. *Emperor* (2). They do not bear directly upon s. 181 (2) but lend some support to the view which we take of s. 181 (2).

We make the Rule absolute, set aside the order of discharge, and direct the learned Magistrate to hear the complaint and dispose of it according to law.

A. N. A. *Rule made absolute.*

(1) 22 Ind. Cas. 991; 38 M. 779; 26 M. L. J. 235; 1 L. W. 302; (1914) M. W. N. 324; 15 Cr. L. J. 207.

(2) 65 Ind. Cas. 637; 24 Bom. L. R. 46; 23 Cr. L. J. 173; A. I. R. 1925 Bom. 39; 46 B. 641.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 577 OF 1926.

October 26, 1926.

Present:—Mr. Justice Martineau and Mr. Justice Campbell.

BAHADURI AND OTHERS—ACCUSED—APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 149, 300—Murder

—*Serious injuries on head resulting in death—Intention or knowledge that injury would probably result in death—Burden of proof—First Information Report, omission of accused's name in—Benefit of doubt.*

A person who strikes another violent blows on the head causing fracture of bones and death must accept the onus of proving that his intention was not to cause such bodily injury as would in all probability cause death or that he did not know that the injury inflicted by him would in all probability cause death. [p. 72, col. 1.]

Where the First Information Report is made by a person who is not an eye-witness, the omission of the name of an accused in the report is not a material circumstance in favour of the accused. [p. 80, col. 1.]

Criminal appeal from an order of the Sessions Judge, Shahpur at Sargodha, dated the 8th April, 1926.

Mr. *R. C. Soni*, for Mr. *M. Sleem*, for the Appellants.

Mr. *J. M. Mackay*, for the Government Advocate, for the Respondent.

JUDGMENT.—Taja, Bahaduri, Sahna son of Shahabal, Mahla and Sahna son of Smail are five persons who were tried jointly by the Sessions Judge, Sargodha, on charges under ss. 302, 147, 326 and 324, Indian Penal Code. Taja was acquitted, Bahaduri was convicted of an offence under s. 325, Sahna son of Shahabal was convicted under s. 323, Mahla was convicted under s. 326 and Sahna son of Smail has not appealed. Bahaduri, Sahna son of Shahabal and Mahla have appealed jointly against their convictions (Appeal No. 577 of 1926) and another appeal has been filed (Appeal No. 699 of 1926) by the Crown praying that all the five persons who were tried should be convicted under s. 302 read with s. 149, Indian Penal Code.

The affair out of which the case has arisen took place on the 12th October 1925. The prosecution story was as follows:—

One Ghulam Hussain Shah of Shahpur City lost a bullock in September and requested his relations to assist him in finding it. These relations got information that the animal was in the house of Bahaduri appellant, and six of them accordingly proceeded one evening to that place. They were Hidayat Shah, Raja Shah, Wilayat Shah, Jiwan Shah, Hussain Shah and Muhammad Shah. They found the bullock among Bahaduri's cattle and seized it. Some argument followed, and Bahaduri eventually permitted them to take away the animal on their promising not to report the matter to the Police. When they had left the village about 200 *karams* they saw a party of people pursuing them. Raja Shah ran away with a bullock. The other five, of whom three were elderly men, were overtaken and attacked by 13 persons including the five accused and were severely beaten. Hidayat Shah was killed. Wilayat Shah and Muhammad Shah were very seriously injured and were taken by the assailants to Bahaduri's house. Hussain Shah and Jiwan Shah were also injured, but they managed to escape.

The defence version was that the occurrence took place later in the evening than is stated by prosecution witnesses, in fact at bed time. Hidayat Shah deceased and his five companions went to Bahaduri's house to steel a bullock. He raised an alarm and a large crowd collected. Two of the thieves, Walayat Shah and Muhammad Shah, were secured. The other ran away with the bullock. The accused professed themselves unable to state how Hidayat Shah was killed, but left it to be inferred that this happened during the pursuit at the hands of some unknown members of the large crowd which had collected from the village to recover the bullock.

The learned Sessions Judge held that the prosecution had failed to prove definitely that the bullock in question belonged to Ghulam Hussain Shah, but he also held that Hidayat and his party genuinely believed it to be Ghulam Hussain Shah's animal, and that they went to Bahaduri's house for the purpose not of committing theft, but of getting back the bullock. The defence story the learned Judge considered to be altogther improbable. He was satisfied that the occurrence took place in the early evening at *digarwela* as stated by the prosecution. He did not believe that the bullock was taken away with the consent of Bahaduri, but he thought that the complainant party quietly removed it. He found that the accused party pursued in order to recover the bullock, that there was a fight, that the accused had no common object to kill or even to cause any grievous hurt and that each man, accordingly, was liable only for the acts proved to have been committed by him.

It was held that the fatal injury to Hidayat Shah was caused by Bahaduri, who had no further intention than to inflict grievous hurt that Sahna son of Shahabal had only caused simple hurt to Wilayat Shah and hence was only guilty under s. 323 and similarly Sahna son of Smail had only caused simple

injury to Hussain Shah. Mahla was held to have caused grievous hurt to Wilayat Shah with a hatchet and so was convicted under s. 326.

The finding of the learned Sessions Judge that the three appellants, Bahaduri, Sahna, and Mahla, were concerned in the affair is not seriously contested. Their learned Counsel has asked us to accept the defence version of theft at Bahaduri's house pinning his faith principally to the fact that the Police found the injured persons Wilayat Shah and Muhammad Shah at that place. In our opinion this story was rightly disbelieved by the learned Sessions Judge. We are satisfied that the occurrence took place outside the village at some distance from Bahaduri's house, and that Wilayat Shah and Muhammad Shah after being injured were removed from there, possibly from motives of humanity, but more probably in order to support a story of justification.

We are also satisfied that all the three appellants attacked and struck members of Hidayat Shah's party. No grounds have been made out for acquitting any of them.

We come now to the Crown appeal, and in this connection we find some difficulty in subscribing to the learned Sessions Judge's observation: "A mere injury on the head does not show that the intention was to kill Hidayat Shah or even to cause him such bodily injury as would in all probability cause death, or even that the assailant knew that the injury he was inflicting would in all probability cause death."

The head injury of Hidayat Shah in the present case, or rather the injuries since there were two, had the effect of fracturing both the right temporal and the right parietal bones and were evidently caused by violent blows of a blunt weapon.

A person who struck another on the head such blows must ordinarily accept the onus of proving that his intention was not to cause such bodily injury as would in all probability cause death or that he did not know that the injury inflicted by him would in all probability cause death.

The learned Sessions Judge considered that the common object of the assembly of which the accused were members was to seize the bullock and was not to cause grievous hurt or even hurt to any complainant party. This finding is scarcely in harmony with the medical evidence.

According to this evidence Hidayat Shah was literally battered to death. His skull was fractured as above stated, four ribs were broken, and the left tibia was fractured. There were marks of thirteen blows struck with blunt weapons. Muhammad Shah had fifteen marks of blows, one inflicted with an edged weapon and the others with blunt weapons. Four marks were on the head. Hussain Shah sustained four blows on the head and three other injuries, seven in all. Jiwan Shah had one injury, and Wilayat Shah had no fewer than five injuries on the head and six others caused with blunt weapons. On the accused's side Taja, the man who was acquitted, had two injuries, one on each leg caused by a blunt weapon.

This evidence read with that given for the prosecution leaves no doubt in our minds that the assembly of which the accused were members, although its first object may have been to recover the bullock, subsequently formed the common intention of attacking and beating the complainants' party in retaliation for the taking away of the animal. There is not a word to indicate that when the accused's party came up with complainants' party there was an attempt made to pass them and to follow the bullock. According to the evidence the accused and their companions stopped there and proceeded to attack Hidayat Shah's party. The numerous injuries received by the latter prove that the persons who inflicted them were numerous. Fourteen head injuries were sustained in all and it is clear that a large number of assailants must have aimed blows at the heads of their victims. There can be no doubt whatsoever from the medical evidence that the persons who beat Hidayat Shah intended to cause such bodily injury as they knew was likely to cause his death; in other words, those persons committed the offence of murder.

Was this an offence which the other members of the assembly knew to be likely to be committed in prosecution of their object to inflict bodily injury upon Hidayat Shah and his companions?

In our opinion it was, and this is proved by the fact that those who attacked persons of the complainants' party other than Hidayat Shah struck them repeatedly on the head. The present appellants have failed to prove any circumstances bringing their action within any of the exceptions to s. 300, Indian Penal Code, or within the sections

dealing with the right of private defence. It is proved that their action was taken, not with a view to recovering property which some of them may have believed to have been stolen or to prevent the escape of persons believed to be thieves, but purely in the spirit of retaliation and revenge. Each of them under the provisions of s. 149 is guilty of the offence of murder under s. 302, Indian Penal Code.

There remains the Crown appeal against Taja. This was found with injuries on his person as already stated and the prosecution evidence against him is precisely the same as against the other accused persons.

He has been acquitted merely because his name does not occur in the First Information Report. This, in our view, is no view, is no adequate reason. The First Information Report was made by Raja Shah, who did not profess, and is not shown, to have been eye-witness of the assault. In that report he named eight persons, including the three convicted by the learned Sessions Judge, whose names he said had been given to him by Hussain Shah, and he further reported that Hussain Shah had said that there were eight or nine other men whose names he did not remember but could be given by the other wounded persons. Both Raja Shah and Hussain Shah were witnesses in the case. Raja Shah was never asked whether Hussain Shah had or had not mentioned Taja to him by name. Hussain Shah was not asked this question either, nor was he asked whether he knew Taja's name at the time. The First Information Report by Raja Shah was no contradiction of the evidence given in Court by Hussain Shah and the other eye-witnesses.

We dismiss the appeal of Bahaduri, Sahna son of Shahabal, and Mahla. We accept the Government appeal, convict all five respondents, Taja, Bahaduri, Sahna, son of Shahabal, Mahla, and Sahna son of Smail of an offence under s. 302 read with s. 149 and sentence each of these persons to transportation for life.

Appeal of the accused dismissed;
Crown appeal accepted.

R. L.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 263 OF 1926.

October 11, 1926.

Present:—Mr. Justice Martineau and Mr. Justice Campbell.

EMPEROR—APPELLANT

versus

JASRAT MAL AND ANOTHER—ACCUSED—RESPONDENTS.

Punjab Municipal Act (III of 1911), ss. 195, 225—Committee's power to order demolition of building—Interference by Magistrate—Remedy of party aggrieved by notice.

A Municipal Committee has power under s. 195 of the Punjab Municipal Act to require a building to be demolished and it is not open to a Magistrate to interfere with the exercise of this power, the remedy of the party aggrieved by the notice to demolish being to appeal to the Commissioner under s. 225 of the Act.

Criminal appeal from an order of the Magistrate, Third Class, Panipat, District Karnal, dated the 30th November, 1925.

Mr. *C. H. Carden Noad*, Government Advocate, for the Appellant.

Mr. *Shamair Chand*, for the Respondents.

JUDGMENT.—This is an appeal by the Crown against an order of a Magistrate acquitting the respondents of an offence under ss. 195 and 219 of the Municipal Act.

The Municipal Committee of Panipat had given permission to the respondents to erect a building, but in erecting it they made certain projections which were in contravention of the sanction given. The Committee issued a notice to them under s. 195 of the Municipal Act to demolish the building, and as the notice was disregarded they were prosecuted and were fined Rs. 10 each by the Magistrate by his order of the 13th February, 1925.

The Committee again issued a notice for the demolition of the building, and as that notice also was not complied with the respondents were prosecuted a second time, but the Magistrate has acquitted them on the ground that in his judgment in the first case he had passed an order that the house should remain standing as the projections caused no inconvenience, which order, not having been set aside by an appeal, he holds to be binding on the parties to the case. It is, however, clear that the Magistrate in giving his judgment in the first case was not competent to prohibit the demolition of the building. The Municipal Committee had power under s. 195 of the Municipal Act to require the building to be demolished, and the Magistrate could not

interfere with the exercise of that power, the remedy of the accused, if they were aggrieved by the notice, being to appeal to the Commissioner under s. 225. The Magistrate's order in the first case directing that the building should stand was, therefore, *ultra vires* and has, in fact, been expunged by us on the motion of the District Magistrate. The respondents not having complied with the second notice issued to them by the Municipal Committee have again incurred a penalty under s. 219 of the Act.

We accordingly accept the appeal and convict them of an offence under that section. As they may have been misled by the order in the first case, we think it is sufficient in this case also to impose on each respondent a fine of Rs. 10, in default of payment of which he will undergo two weeks' simple imprisonment.

R. L. *Appeal accepted.*

BOMBAY HIGH COURT.

CRIMINAL APPEAL No. 865 OF 1926.

August 17, 1926.

Present:—Justice Sir Lallubhai Shah, KT., and Mr. Justice Percival.

In re MANEKLAL GARBADDAS —APPELLANT.

Cr. P. C. (Act V of 1898), ss. 195, 476 —Complaint—Offence committed before Judge of a particular Sessions Division—New Sessions Court constituted for portion of Original Division—Jurisdiction of latter Court to make camplaint—New Court, whether successor of Original Sessions Court.

The Court contemplated by ss. 195 and 476, Cr. P. C., is the Court before which the offence the inquiry of which is contemplated is committed [p. 82, col. 1.]

The circumstance that a District is taken out from a particular Sessions Division and constituted a new Sessions Division under the provisions of the Cr. P. C. does not give the newly constituted Sessions Court power to make a complaint relating to an offence committed at a trial before a Sessions Judge of the Original Sessions Division. [*ibid.*]

Criminal Appeal against an order of the Sessions Judge at Kaira.

Mr. *G. N. Thakor* (with him Mr. *D. G. Dalvi*), for the Appellant.

Mr. *P. B. Shingne*, Acting Government Pleader, for the Crown.

JUDGMENT.

Shah, J.—This is an appeal under s. 476B, Cr. P. C., against an order made by the Sessions Judge of Kaira ordering a complaint to be filed for the offence of perjury with regard to statements made by Maneklal Garbaddas before the Additional Sessions Judge of Ahmedabad on November 20, 1925. Maneklal Garbaddas was examined as a witness at a trial held by the Additional Sessions Judge of Ahmedabad in a case which was committed to the Sessions Court of Ahmedabad by the Resident First Class Magistrate at Borsad. The witness gave evidence in that case, and the case was decided on November 21, 1925.

By a Government Notification, dated October 6, 1925, after January 1, 1926, the District Judge of Kaira was constituted a Sessions Division distinct from the Sessions Division of Ahmedabad under the name of the Sessions Division of Kaira. An application was made by the original accused Nos. 1 and 2 in the Sessions case to which I have referred, to the Court of Session at Nadiad on March 1, 1926. It was stated in the application that it was made to that Court as successor to the Court at Ahmedabad, and, alternatively, as a Court of superior jurisdiction to the Court of the Committing Magistrate at Borsad before which also the offence was committed. The application related to certain statements made by this particular witness and another persons, named Bai Reva, and it was made for action being taken under s. 476, Cr. P. C. The learned Sessions Judge did not consider it proper to direct any complaint to be filed against Bai Reva, but ordered a complaint to be filed against Maneklal Garbaddas in respect of certain statements made by him as a witness in the course of the trial before the Additional Sessions Judge of Ahmedabad.

A point was raised before the learned Judge that that Court had no jurisdiction to direct a complaint to be filed in respect of an offence committed before the Court of the Additional Sessions Judge of Ahmedabad. The learned Judge, however, took the view that as a separate Sessions Division of Kaira was constituted under the Notification to which I have referred, that Court was really the successor of the Court before which the original case was tried, and as such had jurisdiction to make an order under s. 476, Cr. P. C.

The present appeal is preferred from that order. We have not heard the learned Counsel for the appellant on the merits, and we wish to make it clear that we express no opinion whatever as to the merits of the complaint ordered by the lower Court to be filed.

At the outset we have to consider the question of jurisdiction. It seems to me that the Court contemplated by ss. 195 and 476, Cr. P. C., is the Court before which the offence is committed. The alleged offence is one of giving false evidence, and it is difficult to see how the circumstance that from January 1, 1926, the Kaira District was taken out from the Sessions Division of Ahmedabad, and was constituted a new Sessions Division under the Cr. P. C. can make any difference to the question as to whether the Court contemplated by s. 476, Cr. P. C., is the Court before which the offence was committed. So far as the present point is concerned, it is difficult to treat the Sessions Court at Kaira as successor to the Court of the Additional Sessions Judge of Ahmedabad. It would be perfectly open to the present applicant to move that Court or any successor of that Court at Ahmedabad for such action to be taken as that Court may think proper. But we are unable to agree with the view taken by the learned Sessions Judge of Kaira that that Court has jurisdiction to direct a complaint to be filed with reference to this particular offence which is said to have been committed in the course of judicial proceedings before the Additional Sessions Judge of Ahmedabad. On this ground, and on this ground only, we allow the appeal and direct a withdrawal of the complaint ordered to be filed by the lower Court. This will be, of course, without prejudice to any application that may be made hereafter to the Court at Ahmedabad with reference to this very matter.

Percival, J.—I agree. I would only add that in the application to the Sessions Judge of Kaira, it was stated that the application was made to that Court as successor to the Court at Ahmedabad, or, alternatively, as a Court of superior jurisdiction to the one of the Committing Magistrate at Borsad before which also the offence had been committed. It would be a different point to consider whether the Sessions Judge at Kaira is a Court of superior jurisdiction to the Committing Magistrate at Borsad, which at that time was under the Sessions Judge of Ahmedabad, but is now under the Sessions Judge of Kaira. However, that point does not really arise in this case, because the order of the Sessions Judge of Kaira distinctly refers to an offence committed by Maneklal in respect of a statement recorded by the Additional Sessions Judge of Ahmedabad in the Sessions Case No. 91 of 1925, or to such other offence or offences as may be disclosed by the circumstances of the case. These latter words refer to other offences committed before the Additional Sessions Judge of Ahmedabad, and no reference is made to the proceedings in the Court of the Committing Magistrate at Borsad.

A. N. S. *Appeal allowed.*

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION No. 1152 OF 1926.

October 29, 1926.

Present:—Mr. Justice Harrison.

DURGA DAS—ACCUSED—PETITIONER

versus

EMPEROR—RESPONDENT.

Cr. P. C. (Act V of 1898), s. 407—Trial begun by Second Class Magistrate—Magistrate invested with First Class powers before decision—Appeal, forum of.

Where a Second Class Magistrate subsequent to his entering upon the trial of a case is invested with the powers of a First Class Magistrate and gives his decision in the latter capacity, appeal from his order lies to the Sessions Judge and not to the District Magistrate.

Sheobhanjan Singh v. *Emperor* (2), followed.

Emperor v. *Nga Paw* (1), not followed.

Petition for revision of an order of the Sessions Judge, Jullundur, dated the 28th June, 1926.

Mr. *R. C. Soni*, for the Petitioner.

JUDGMENT.—One Durga Das was tried by Bawa Sundar Singh and ultimately convicted and sentenced. The facts in this case are that proceedings commenced in a *chalan* under s. 353, on the 28th November, 1925, the Magistrate being Bawa Sundar Singh, exercising powers of a Second Class Magistrate. On the 10th December, the evidence of eight prosecution witnesses was recorded and on the 15th January, 1926, the Magistrate was gazetted to be a First Class Magistrate. On the 27th January two more prosecution witnesses were recorded and a charge was framed. Eventually the judgment was pronounced on the 10th May, and the accused was convicted. He appealed to the Sessions Judge, Jullundur, who relying on *Emperor* v. *Nga Paw* (1) quoted at page 885 of Mitra's Criminal Procedure Code returned the appeal for presentation to the District Magistrate. This ruling is

(1) 1 L. B. R. 239; 8 Cr. L. J. 48.

to be found in 8 Criminal Law Journal 48 *Emperor* v. *Nga Paw* (1) and the facts there were that on the day the judgment was pronounced the Magistrate received enhanced powers. There is a reported case of a Division Bench of the Patna High Court in which the facts were similar to those in this case, namely, *Sheo Bhanjan Singh* v. *Emperor* (2), and in which it was held that the appeal lay to the Sessions Judge. The Magistrate had there been empowered, some time before the hearing of the arguments. In this case he was empowered before the prosecution evidence was completed or the charge was framed. In *Queen-Empress* v. *Pershad* (3) an analogy is to be found, for it is there laid down that a Magistrate under these circumstances who begins as a Second Class Magistrate and completes the case as a First Class Magistrate is entitled to pass the higher sentence in the latter capacity and it is explained in this Full Bench judgment that, were this not so, the impossible position might arise of a *de facto* First Class Magistrate reporting a case for an adequate sentence, which sentence as a First Class Magistrate he could pass himself. I find, following *Sheo Bhanjan Singh* v. *Emperor* (2) that the course of appeal is to the Sessions Judge. I accept the application for revision and direct the Sessions Judge to proceed to dispose of the appeal in accordance with the law.

R. L. *Petition accepted.*

(2) 86 Ind. Cas. 978; (1925) Pat. 120; A. I. R. 1925 Pat. 472; 3 Pat. L. R. 100 Cr.; 26 Cr. L. J. 914; 6 P. L. T. 554.

(3) 7 A. 414; A. W. N. (1885) 105; 4 Ind. Dec. (N. S.) 565.

BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION No. 247 OF 1926.

September 1, 1926.

Present :—Justice Sir Lallubhai Shah, KT., and Mr. Justice Percival.

PALMERINO—APPLICANT

versus

PALMERINO—OPPOSITE PARTY.

Cr. P. C. (Act V of 1898), s. 488—Maintenance order—Monthly rate exceeding Rs. 100, magistrate's jurisdiction to order payment of—Invalidity of marriage—Criminal Court's power to set aside order—Application to Matrimonial Court to declare nullity of marriage, necessity of.

A Magistrate has no jurisdiction under s. 488, Cr. P. C., to make an order for payment of maintenance at a rate exceeding Rs. 100 per month. [p. 84, col. 1.]

A husband applied for cancellation of an order for maintenance passed against him in favour of his wife on the ground that their marriage was null and void as his wife was not a widow at the time of the marriage as she had represented herself to be. This plea was not set up as a defence in the application by the wife for maintenance :

Held, that the proper remedy of the applicant under the circumstances was to apply to the Court having matrimonial jurisdiction in the matter to have the marriage declared null and void. [*ibid.*]

Application from an order passed by the Special Magistrate, First Class, Poona.

Mr. *N. H. C. Coyajee*, for the Applicant.

JUDGMENT.—This is a very unusual case. An order was made by the Special First Class Magistrate, Poona Cantonment, on April 12, 1924, on the application of the wife for her maintenance and the maintenance of her child against her husband. At that time apparently there was no dispute between the parties as to the fact of the marriage. The learned Magistrate made an order directing the present petitioner to pay Rs. 150 per mensem for the maintenance of the wife and the child. This order was apparently acquiesced in without objection by the husband for a considerable length of time. The present petition was made in July last for setting aside that order. The petition is based on two grounds, first, that the order directing Rs. 150 to be paid per month is in excess of the jurisdiction of the Magistrate under s. 488, Cr. P. C., and, secondly, that the petitioner has subsequently found that, before the marriage between him and his wife which took place on February 8, 1921, the present opponent had already married one Patrick Durney, and that, though, in fact, he was alive, it was falsely represented by her at the time of the marriage with the petitioner that she was a widow. In other words, the allegation is that at the time of the marriage it was falsely represented to the petitioner that Patrick Durney was dead. The petitioner now alleges that on inquiry he has learnt that Patrick Durney is alive. It is contended that the marriage being null and void on account of her first husband being alive at the time of the marriage in question, no order under s. 488, Cr. P. C., could be made.

As regards the first ground, we think that the contention of the petitioner is

right. The Magistrate can make an order for the maintenance of his wife and child at such monthly rate, not exceeding one hundred rupees on the whole as he thinks fit. In the present case the order of the Magistrate directing a monthly allowance to be paid at the rate of Rs. 150 per month was clearly in excess of his jurisdiction. Though, in this case a notice has been served upon the person who claimed to be the wife of the petitioner she has not appeared, and we have not heard any argument on her behalf. The first contention of the applicant appears to be right. In fact, it is difficult for one to understand how the learned Magistrate made an order so clearly in excess of his jurisdiction, and how the present petitioner came to acquiesce in that order for so long a time. However that may be, it seems that the order is open to that objection, and can be, and ought to be, corrected now.

As regards the further question whether the marriage, which is said to have been gone through in February 1921 between the present petitioner and the opponent, was null and void in consequence of her first husband being alive, we think that the question cannot properly be dealt with on this application. That is a matter in respect of which it is perfectly open to the petitioner to take such steps as he may be advised under the matrimonial jurisdiction of the proper Court to have that marriage declared null and void. It is obvious that a question of this nature cannot be considered on this revisional application. This matter might have been different if the present petitioner had been in a position to adduce evidence, at the time when the application of the wife was heard, that she was not his wife according to law. However, he was not in that position then. Under the circumstances, it must be left to be determined in a proper proceeding under the matrimonial jurisdiction of the Court which may have jurisdiction to deal with the matter. It may be open to the petitioner to obtain a proper interlocutory order by way of injunction from that Court restraining the present opponent from taking benefit of the order which has been made against him under s. 488, Cr. P. C. But, until that is done, we do not think it would be reasonable for us, under the circumstances of this case, to make any further order on the basis of the allegation affecting the validity of the marriage.

We, therefore, modify the order made by the learned Magistrate on April 12, 1924, by reducing the allowance to Rs. 100 per month. This will be without prejudice to any relief that the applicant may seek from the proper Court in the exercise of its matrimonial jurisdiction.

A. N. A. *Order modified.*

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION No. 869 OF 1926.

September 30, 1926.

Present:—Mr. Justice Broadway.

CHANDGI—ACCUSED—PETITIONER

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 498—Abduction—Woman actively abetting her own abduction—Sentence.

When the woman is an active abettor in her own abduction the sentence for abduction should be a light one.

Petition for revision of an order of the Sessions Judge, Karnal, dated the 13th May, 1926, modifying that of the Magistrate, First Class, Rohtak, dated the 19th April, 1926.

Mr. *Shamair Chand*, for the Petitioner.

Mr. *Abdul Rashid*, Assistant Legal Remembrancer, for the Respondent.

JUDGMENT.—I do not see any reason to interfere with the conviction but the question of sentence needs consideration. It appears that the complainant Molia had married his deceased brother's widow *Musammat* Surti. In marriages of this sort, as pointed out by the learned Sessions Judge the woman has no say of any kind, and the result often is that she gladly goes off with a lover. It has often been held that when the woman is an active abettor in her own abduction the sentence should be a light one. In the present case in all probability *Musammat* Surti was by no means willing to marry the complainant and there seems every reason to believe that she actively abetted her own abduction. In these circumstances I think the sentence already undergone will meet the requirements of law and I reduce the sentence of imprisonment accordingly. The sentence of fine will stand.

R. L. *Sentence reduced.*

BOMBAY HIGH COURT.

CRIMINAL APPLICATIONS FOR REVISION NOS. 200 AND 203 OF 1926.

September 22, 1926.

Present :—Justice Sir Lallubhai Shah, KT., and Mr. Justice Fawcett.

In re MUDKAYA ANDANAYA HIREMATH.

Cr. P. C. (Act V of 1898), ss. 476, 556—Complaint by Sessions Judge—Sessions Judge, whether 'a party' to proceedings—Discharge of accused—Sessions Judge's power to revise order of discharge and direct committal—Cr. P. C. (Amendment) Act (XVIII of 1923), effect of.

A Sessions Judge who makes a complaint under s. 476, Cr. P. C., is a party to the proceedings initiated in pursuance of his complaint within the meaning of s. 556, Cr. P. C., and is, therefore, disqualified from hearing an application to revise an order discharging the persons complained against. [p. 86, col. 1.]

Applications from the orders of the Sessions Judge, Dharwar, reversing those of the Magistrate, First Class, Dharwar.

Mr, *G. P. Murdeshvar*, for the Applicant.

Mr. *A. G. Desai*, for the Opponent.

Mr. *P. B. Shingne*, Acting Government Pleader, for the Crown.

JUDGMENT.

Shah, J.—The circumstances under which these two applications in revision have been made to this Court are these. In a certain murder case the learned Sessions Judge of Dharwar, who tried the case, acquitted all the accused, and, under s. 476, Cr. P. C., made a complaint against the present applicants and others charging them with offences punishable under s. 194, Indian Penal Code. An offence under s. 194, Indian Penal Code, is exclusively triable by a Court of Session. The First Class Magistrate, who dealt with the complaint, recorded the evidence and ultimately discharged both the present petitioners by separate orders on October 19, 1925, under s. 209, Cr. P. C. Narsapaya Sankapaya Deshpande, one of the persons acquitted in the original murder case, made applications to the Sessions Judge of Dharwar under s 435, Cr. P. C , to revise these orders. The learned Sessions Judge, Mr. Ferrers, who had filed a complaint against the present petitioners, heard these applications and made an order under s. 437, Cr. P. C., directing the Magistrate to commit the petitioners to be tried by the Sessions Court. Apparently no objection was taken to the learned Sessions Judge dealing with those two applications in revision.

The two applicants, against whom the Sessions Judge made these orders, have applied to this Court in revision. The first point that is urged in support of these applications is that the learned Sessions Judge, who had initiated proceedings against the petitioners, was not legally competent to make an order directing the committal of these two persons to the Sessions Court. In support of this contention reliance is placed upon the provisions of ss. 556 and 487, Cr. P. C., and it is urged that, in view of the fact that the Sessions Judge, who had tried the original case on the charge of murder, out of which these proceedings arose, had lodged the complaint under s. 476, Cr. P. C., against the present petitioners, he was not competent to make such an order. Secondly, it is urged that the order of discharge made by the Magistrate in this case has been made after a consideration of the evidence, that it was competent to him to make the order, and that it should not have been set aside by the learned Sessions Judge in revision.

Having regard to the nature of the order made by the Sessions Judge, as also to the circumstances of the case, we thought it proper that we should hear the Government Pleader in the case who did not appear in the first instance. I may mention that Narsapaya Sankapaya Deshpande has been represented before us, and Mr. Desai has opposed the present applications on his behalf. We are informed by the Government Pleader that he has instructions from the District Magistrate to say that he does not desire to proceed with the prosecution of these two petitioners. We have, however, heard Mr. Desai in support of the order made by the learned Sessions Judge.

As regards the first point, it seems to me that as the learned Sessions Judge filed a complaint under s. 476, Cr. P. C., against the present petitioners, he was a party to the proceedings before the Magistrate for the purposes of s. 556. That section provides that :—

"No Judge or Magistrate shall, except with the permission of the Court to which an appeal lies from his Court, try or commit for trial any case to or in which he is a party, or personally interested, and no Judge or Magistrate shall hear an appeal from any judgment or order passed or made by himself."

Having regard to the admitted facts with reference to the present proceedings, it seems to me that the learned Sessions

Judge who filed the complaint under s. 476, Cr. P.C., was disqualified from hearing the applications made to that Court under ss. 435 and 437 and from making an order directing the petitioners to be committed to the Sessions Court. In the view which I take of the position of the Sessions Judge with reference to these proceedings and the scope of s. 556, Cr. P. C., it is not necessary to consider whether, in view of the provisions of s. 487, Cr. P. C., he was legally competent to deal with the applications made to that Court. The substance of the matter, to my mind, is that as the learned Sessions Judge himself directed the prosecution of these persons, and was formally the complainant, the applications to the Sessions Court should have been heard by another Judge having the same powers, but not by him, so that if an order directing the committal of these persons was to be made, he could do so without any legal difficulty.

Our attention has been drawn by Mr. Desai to certain decisions, of which the case of *Emperor* v. *Gulam Ahmed Ali Saheb* (1) is a type. It was a case of sanction granted under s. 195, Cr. P. C., as it stood then. Further, it was not a case in which the Sessions Judge had granted the sanction; but the District Judge had granted it. I do not think that the decision in that case or its *ratio decidendi* could apply to the facts of the present case. In this case the learned Sessions Judge, who heard the applications, was the complainant, and Mr. Desai has not been able to find any decision in support of his contention that even where he is the complainant, he could deal with the matter against the accused judicially in contravention of the provisions of s. 556, Cr. P. C.

On this ground the orders made by the learned Sessions Judge are liable to be set aside. The question then arises as to what order we should make now. Broadly speaking, the position is that in the course of the Sessions trial these two petitioners gave evidence which the learned trial Judge thought was false, and that they were liable to be charged under s. 194, Indian Penal Code. Accordingly, he lodged a complaint and the Committing Magistrate, who held an enquiry under Ch. XVIII of the Cr. P. C., came to the conclusion that the petitioners should be discharged. Whether the learned Magistrate transgressed the proper limits of an inquiry open to a Committing Magistrate under the Cr. P. C., or acted within those limits, is a matter upon which I do not consider it necessary to express any opinion. But it cannot be said in this case that he came to the conclusion in favour of the present petitioners without a fair and full consideration of the evidence before him. I also take into consideration the fact that, in the very beginning of his order, he directed himself as to what he had to consider in para. 2 of his order in a manner which cannot be said to be open to any objection. We know definitely now that the Crown does not desire to prosecute the present petitioners. Under these circumstances, it seems to me that it would be fair to let the order of discharge made by the Magistrate remain undisturbed.

I wish to make it clear that it is under the particular circumstances of this case that I have come to the conclusion that the order of discharge may be allowed to stand. If it had been necessary to consider the case in its detail, it is not unlikely that we might have directed the applications made to the Sessions Court of Dharwar to be transferred to another Sessions Court in order that that Court may hear the parties, including the Crown. But we know definitely that the Crown does not desire to prosecute the petitioners. It seems to me that, under the circumstances of this particular case, no further proceedings are necessary.

On these grounds, I have come to the conclusion that the orders made by the learned Sessions Judge should be set aside. I would order accordingly.

Fawcett, J.—In this case the main consideration is that the Sessions Judge who directed proceedings under s. 476, Cr. P. C, against the two petitioners is the same Judge who heard the applications under s. 437, Cr. P. C. He was the actual complainant in view of the terms of s. 476, as it stood in 1924, when proceedings were initiated. It seems to me difficult to resist the conclusion that, in view of the change made in s. 476, Cr. P. C., the Judge or Magistrate who proceeds under the provisions of that section is a party to the case in which he is a complainant, within the meaning of s. 556, Cr. P. C. This inevitably affects decisions that the mere fact that a Judge or Magistrate took action under the former provisions of the Code did not make him fall within the provisions of s. 556,

(1) 19 Ind. Cas. 190; 15 Bom L. R. 104; 14 Cr. L. J. 190.

Cr. P. C. At the same time I think that the terms of that section should be limited to the cases with which it purports to deal, namely, such Judge or Magistrate trying or committing for trial or hearing an appeal in any case to which he is a party or in which he is personally interested. I, therefore, would not go so far as to say that, if the Sessions Judge had, for instance, merely directed further inquiry by some other Magistrate under s. 436, Cr. P. C., his action would fall under the ban of s. 556, Cr. P. C., for I do not think it could properly be said that he was "trying the case" within the meaning of that expression in the section. In regard to this, I may refer to the remarks of Carnduff, J., in *Lakhai Narayan Ghosh* v. *Emperor* (2) and of Knox, J., in *Emperor* v. *Mohan Lal* (3). But in the present case, Mr. Ferrers has directed the Magistrate, who discharged the accused, to commit the two petitioners to the Sessions Court over which he presides. That, I think, clearly amounts to committing the case for trial within the meaning of s. 556, Cr. P. C. It is true that that section does not say "or cause to commit for trial." But the plain effect of his order is to commit the petitioners for trial, and I think the ordinary maxim *qui facit per alium, facit per se* applies to cover a case of this kind. And, in connection with this, I think, it is also useful to draw attention to the fact that, whereas under the Code, as it originally stood, the Court of Session could, under s. 477, directly commit for trial persons that it thought had perjured themselves before it, that power no longer exists, as the section was repealed by the Amending Act XVIII of 1923. The Joint Committee's Report of 1922, cited in Sohoni's Criminal Procedure Code at page 1005, shows that that was done because the Committee did not think it desirable that the Court which had instituted the proceedings should dispose of the case itself. That is a further reason, to my mind, why the action of the Sessions Judge in directing the committal of the accused is open to legal objection. The object of the law evidently is that if there is to be a committal, that committal should be made by an independent Magistrate or other proper authority. Therefore, I agree that the orders of the learned Sessions Judge should be set aside.

(2) 6 Ind. Cas. 276; 37 C. 221 at p. 223; 14 C. W. N. 589; 11 C. L. J. 415; 11 Cr. L. J. 305.

(3) 27 A. 25 at p. 27; A. W. N. (1904) 154; 1 Cr. L. J. 605.

As regards the further disposal of the matter, in an ordinary case I should certainly say that the applications for revision, which had been made to the Sessions Court of Dharwar, should be transferred to some other Sessions Judge for disposal according to law. But, in the present case, in all the circumstances, I defer to the view of my learned brother that the best course is to direct that no further proceedings in the matter should be taken. We must, I think, give some weight to the District Magistrate's view that no further proceedings should be taken, although I do not consider that that alone should be conclusive in a case of this kind. It might be that the Sessions Judge had a clear case for ordering a prosecution, and that the mere wish of the District Magistrate that the prosecution should not take place, should not be allowed to prevail over the Sessions Judge's view. But, in the present case, it is certainly a matter, at any rate, of some doubt as to whether or not the Magistrate, who made the inquiry into the case, could not legally come to the conclusion that the evidence of the prosecution was so unreliable that there was really no *prima facie* case for committing the accused to the Sessions. That, at any rate, is a position which is arguable under the rulings in *In re Bai Parvati* (4) and *Emperor* v. *Bai Mahalaxmi* (5). Therefore, the view of the Sessions Judge that in any case the charges against the two petitioners should be brought before the Sessions Court is not necessarily correct. Also the circumstances, to my mind, make it extremely doubtful whether further proceedings are likely to result in a conviction. Accordingly, I assent to the order proposed by my learned brother.

A. N. A. *Order set aside.*

(4) 8 Ind. Cas. 631; 35 B. 163; 12 Bom. L. R. 923; 11 Cr. L. J. 692.

(5) 31 Ind. Cas. 347; 17 Bom. L. R. 910; 16 Cr. L. J. 747.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 786 OF 1926.

November 4, 1926.

Present:—Mr. Justice Fforde and Mr. Justice Addison.

EMPEROR—APPELLANT

versus

ABDUL LATIF—ACCUSED—RESPONDENT.

Cr. P. C. (Act V of 1898), ss. 417, 423—Appeal from acquittal—High Court, when interferes.

In an appeal from an acquittal High Court is not entitled to weigh the evidence and decide whether or not the lower Court has come to a wrong conclusion unless it is able to hold that the finding of the trial Court is manifestly wrong or perverse or such as no reasonable man can arrive at upon the evidence.

Criminal appeal from an order of the Magistrate, First Class, Delhi, dated the 31st March, 1926.

Mr. *R. C. Soni*, for the Government Advocate, for the Appellant.

Mr. *Dev Raj Sahni*, for the Respondent.

JUDGMENT.

Fforde, J.—This is an appeal by the Crown from an acquittal of Abdul Latif a warder in the Reformatory School at Delhi on a charge of having received a clock and a watch from one Taj-ud-din knowing these articles to have been stolen.

It is not disputed that Taj-ud-din did steal these two articles from a Major Terris, and it is not disputed that these articles were found in the possession of the respondent two months after the theft. The sole question which the Court below has tried was whether or not the respondent when he received these articles knew, or had reasonable ground for believing, that they had been stolen. The evidence which the Crown put forward in the trial Court to establish this knowledge against the respondent is, first of all, the fact that the thief had at one time been in the Reformatory School of which the respondent is a warder, and the inference which the Crown seeks to draw from this circumstance is that the respondent should have known that Taj-ud-din was a bad character. As against this, it is admitted that Taj-ud-din was discharged in due course from the Reformatory School, and for all that is known to the contrary he has been leading a respectable life for seven years. There is no evidence whatsoever as to any sinister association between the respondent and Taj-ud-din during those seven years. The Crown strongly relied upon an alleged statement made by the respondent when the articles were discovered in his possession, that they had been pawned with him for Rs 9. This statement is supplied by the Sub-Inspector, Raja Hari Pal Singh, who added that certain other articles also were stated by the respondent to have been pawned with him. Certain other articles were found in possession of the respondent, but they are of a wholly valueless nature, comprising shoulder chains, a coral necklace, a toy in the shape of an acrobat, a leather case of a watch and a bronze medal. It is not conceivable that any person in his senses would have taken any such articles as security for the advance of money. As against this evidence two other Crown witnesses, one a Manager of the Reformatory School, and the other a Compounder there, were produced. The Manager stated that he did not remember what the respondent said on the occasion in question. The Compounder stated that the respondent told the Sub-Inspector that Taj-ud-din had left the articles with him and that he did not state that he had pawned them. In view of this conflict of opinion as to what the respondent stated at the time, no Court would be safe in accepting the uncorroborated recollection of a public officer. In the trial Court the respondent stated that the clock and the watch were given to him by Taj-ud-din for safe keeping and were not pawned with him. It has not been shown that the other trivial articles were stolen. There is no evidence whatsoever put forward by the Crown to show that the respondent had any knowledge that Taj-ud-din was addicted to theft, nor is there any evidence that Taj-ud-din was in fact so addicted. It is not suggested that he had ever been previously charged with any offence and, accordingly, the Court is not entitled to infer that the respondent should have suspected any thing wrong, when Taj-ud-din brought him the two articles in question. The defence produced evidence to show that Taj-ud-din was the owner of a Cigarette Factory in Lahore called the Taj Cigarette Factory. No evidence was produced by the Crown upon this matter of his occupation. The owner of the clock and watch, Major Terris, stated that they had been in his possession for sometime, and that he had originally paid a sum of Rs. 100 for the clock and Rs. 75 for the watch, but no body has said what their present value is. Obviously the price of these second-hand articles could not be anything like the sum originally given. The learned Magistrate upon these facts has acquitted the respondent. In an appeal against such an acquittal this Court is not entitled to weigh the evidence and decide whether or not the learned Magistrate has come to a wrong conclusion, unless it is able to hold that the finding of the trial Court is manifestly wrong or perverse, or such as no reasonable man

could have arrived at upon that evidence. Under these circumstances I am of opinion that the appeal must be dismissed and that the respondent be discharged from his bail-bond.

Addison, J.—I concur.

R. L. *Appeal dismissed.*

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION No. 127 OF 1926.

September 10, 1926.

Present:—Mr. Kincaid, J. C., and Mr. Barlee, A. J. C.

SHAH MAHOMED AND ANOTHER—ACCUSED—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Cr. P. C. (Act V of 1898), ss. 209, 437—Accused, discharge of—Order upheld in revision—Fresh complaint on same facts, if competent.

Where an accused person has been discharged under s. 209, Cr. P. C., and the order of discharge has been upheld by a higher authority, it is not competent for a Magistrate to entertain a second complaint on the same charge.

Chandiram Verhomal v. *Emperor* (1), followed.

Application to revise an order of the District Magistrate, Thar Parkar.

Mr. *E. Raymond*, for the Applicants.

Mr. *T. G. Elphinston*, Public Prosecutor for Sind, for the Crown.

JUDGMENT.—The applicants state that they were prosecuted with some other persons in the Court of the Sub-Divisional Magistrate, Mirpurkhas, on charges under ss 471 and 474, Indian Penal Code. Offences under these sections are exclusively triable by a Court of Session; the Sub-Divisional Magistrate discharged them and committed one accused only. A revisional application was then made to the Sessions Court, under s. 437, Cr. P. C., but it was rejected by the Additional Sessions Judge Then followed the trial of Nur Mahomed, the accused who had been committed for trial, and he was convicted by the same Additional Sessions Judge who expressed the opinion that Nur Mahomed had been a mere tool in the hands of others and suggested further enquiry to discover his principals. The result was that a fresh complaint was made against the two applicants to the District Magistrate, Thar Parkar, and he has taken cognizance of it. We are now asked to quash his orders and dismiss this second complaint.

It is conceded that s. 403 of the Cr. P. C. is not applicable in this case, since the applicants have not been acquitted of the offences with which they have been charged. But it is their case that the order of the Sessions Court, by which the application made by the Crown for a committal order, was dismissed, is a bar to the entertainment of a fresh complaint, since by accepting the complaint the Magistrate is virtually revising the orders of a Court of superior jurisdiction. Their learned Pleader relies on the case of *Chandiram Verhomal* v. *Emperor* (1). In that case certain persons were charged with theft, but the charge against them was withdrawn under the orders of the District Magistrate, and they were discharged. Subsequently the successor of the District Magistrate ordered their prosecution on the same charge and a fresh complaint was filed and accepted. They applied to this Court that the complaint might be dismissed. It was then held that the Magistrate to whom the second complaint was made was not competent to entertain it so long as the previous order of dismissal by a competent authority had not been set aside; and, further, that it could be set aside only by proceedings under s. 437, Cr. P. C.

It appears to us that the case with which we are now dealing is even stronger If a Magistrate is not competent to entertain a fresh complaint until the order of dismissal by another Magistrate has been set aside *a fortiori* he cannot do so in the face of an order of the Sessions Court. Were we to decide otherwise it is obvious that even an order of this Court would not be final. In spite of it a private complainant would be able to harass an enemy by periodical complaints in the same matters.

The learned Public Prosecutor has sought to distinguish this case on the ground that the Additional Sessions Judge who had refused to order a committal of the applicants, himself suggested a further enquiry after he had tried the man who had been committed. But it does not appear to us that this fact alters the matter. The Additional Sessions Judge had no authority to revise his own order and did not attempt to do so. In spite of the remark made by him in his judgment that order remained a bar to any further proceedings

(1) 69 Ind. Cas. 625; 15 S. L. R. 131; A. I. R. 1922 Sind 23; 23 Cr. L. J. 737.

against the applicants on the same charges.

For these reasons we set aside the Magistrate's orders issuing process upon the complaint and dismiss the complaint in the exercise of our powers as a Revisional Court.

P. B. A. *Order set aside.*

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 592 OF 1926.

October 26, 1926.

Present:—Mr. Justice Coldstream.

LAL AND ANOTHER—ACCUSED —APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 34, 326—Accused acting with one purpose—Grievous injuries, author of, not known—Constructive liability of all.

Where a number of persons acting together with one purpose beat the complainants and inflict on them many severe injuries, several of them being the result of a cutting weapon, even if it is not proved who used the weapon, all of them must be held constructively guilty of causing grievous hurt unless they can prove that their action was in the circumstances legitimate.

Appeal from an order of the Sessions Judge, Montgomery at Lahore, dated the 21st April, 1926.

Mr. *R. L. Saunders*, for the Appellants.

Mr. *Govind Ram Khanna*, for the Government Advocate, for the Respondent.

JUDGMENT.—The accused in the case from which this appeal arises were the collaterals of one Bahawala who being sonless had made a Will in favour of one Rahmat. The collaterals prevailed on Bahawala to resolve to cancel this Will and themselves took possession of and cultivated the land. This provoked the ill-will of Rahmat and his relations. There was a fight between the two factions on the 25th November, 1925, in the course of which on Rahmat's side his cousin Ghula (or Ghilla) received a mortal injury, his skull being cut by a blow from a sharp weapon. Ghulla's body showed no other injuries but his brother Mokha received three cuts one of which cut the bone in his forearm and Shahamda received two cuts on his hand and arm, five blows with a blunt weapon on the head and another on the thigh, one of those on the head being a grievous hurt, Fattu father of Ghulla received a comparatively trivial blow on his arm. On the other side Sadullah was hit on the head, back and arm and Lal showed four contused wounds on his hands and arm, one of which broke a finger.

The Police sent up the whole body of Bahawala's collaterals for trial and led evidence to prove that following on an altercation between Rahmat's brother Shahamda on one side and Kanda and Pira on the other, the accused, in accordance with a pre-concerted plan came upon the spot armed with *dangs* and *chhavis*. Ghulla and Mokha and then Fattu intervened to protect Shahamda but these along with Shahamda were set upon and beaten by the accused who took away two camels that Shahamda had been leading.

The accused pleaded *alibi*, all except Sadullah and Lal whose story was that Sadli's brother had earlier in the day caught two camels belonging to Rahmat damaging Bahawala's field and taken them away to the pound. Later, when Sadli was carrying seeds to the field he was molested by Shahamda, Mokha, Fattu and Allah Ditta of the Rahmat's party. Lal came to Sadli's rescue but was injured, then other villagers came and rescued Lal and Sadli.

No evidence in support of the accused's version was produced. The Magistrate disbelieved the complainants' description of the origin and details of the fight was "palpably false." He thought that the fight was sudden and not intended by the accused who were not the aggressors though they had gathered in force, apprehending resistance to their cultivation of Bahawala's land from the complainants' party and were prepared to meet and oppose this resistance. He found no satisfactory proof as to who inflicted the various injuries on the wounded complainants but being satisfied that Lal and Sadli took part in the fight convicted these two only and sentenced them to four years' rigorous imprisonment under s. 326, Indian Penal Code. Against these sentences Lal and Sadli have filed this present appeal and Mr. Saunders who appears for them urges that the learned Sessions Judge was wrong to convict his clients after disbelieving the prosecution evidence and finding that the fight arose out of a fracas in which the complainants and not the accused had been the aggressors.

I have myself studied the evidence in the light of this criticism, I agree with

the Magistrate's view that the complainants' story is not to be believed in all its details and that it is not proved which of the accused inflicted the various injuries on the complainants. It is, however, certainly proved that a party including the appellant acting together with one purpose beat the complainants and inflicted on them many severe injuries, several, the result of blows with a cutting weapon. It is not proved who used the cutting weapon. There can be no doubt that the appellants must be held constructively guilty of causing grievous hurt unless they can prove that their action was in the circumstances legitimate. Such proof is entirely lacking here and I am not, therefore, able to interfere with the conviction. But having regard to the circumstances of this particular case (which need not be detailed in this judgment) I think that the degree of constructive guilt of the appellants will be sufficiently punished by a much lighter sentence than has been inflicted. I accordingly accept the appeal of Lal and Sadullah to this extent only that their convictions being upheld their sentences are reduced to one year's rigorous imprisonment in each case including two months' solitary confinement.

R. L. *Sentence reduced.*

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 571 OF 1926.

July 29, 1926.

Present:—Mr. Justice Duval and Mr. Justice Roy.

RASUL KHAN—ACCUSED—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Cr. P. C. (Act V of 1898), s. 411—Disposal of property—Theft—Acquittal—Accused's right to possession of property—Bond from complainant, Court's power to take.

A person acquitted of a charge of theft is not entitled to re-delivery of the properties stolen where the Court finds, though it had to acquit the accused for want of sufficient evidence, that the properties had actually been stolen from the complainant. [p. 92, col 1.]

A Criminal Court has no power to order the complainant to execute a bond till the disposal of the question of title to such properties by a Civil Court. [p. 92, col. 2.]

Criminal Revision against an order of the Sessions Judge, 24-Perganas, dated the 3rd May, 1926, reversing that of the Sub-Deputy Magistrate, Sealdah, dated the 15th March, 1926.

Miss *Shorabji*, Babus *Jahnabi Charan Das Gupta* and *Narendra Nath Chatterjee*, for the Petitioner.

Babu *Dwijendra Krishna Dutt*, for the Crown.

JUDGMENT.

Duval, J.—The facts out of which this Rule arises are as follows: The complainant is one Mathoo. His case is that he owned 4 buffaloes which apparently strayed away and were finally taken to the pound by some *goalas* who found them grazing at the Alipore Cantonment. Subsequently those buffaloes not being claimed within ten days, were sold, it is stated, under the provisions in force in this military pound and they were purchased by the present petitioner. Subsequently the complainant recognised two of his buffaloes going along the Upper Circular Road. He then discovered that they were in the possession of the present petitioner as also the other buffaloes. He then brought the case. Nathoo and another person were put on their trial before the Sub-Deputy Magistrate of Sealdah, exercising first class powers and were convicted and sentenced to three months' rigorous imprisonment under s. 411, Indian Penal Code. It may be added that when the case was started the buffaloes were handed over to the complainant on security under the provisions of s. 516 (*a*), Cr. P. C., and the complainant engaged to produce them unless the order was set aside on appeal. The case came up on appeal before the Sessions Judge of Alipore and was heard on the 6th of April. The learned Sessions Judge found that the evidence of the receiving of stolen property was not sufficient and he, therefore, acquitted the accused. But he came to a finding that the buffaloes in question were the original property of Mathoo; and he was also of opinion that there was something not quite straightforward which led to the sale at the Alipore pound. At the time of passing his judgment he passed no order as to what would be done with the buffaloes and it appears that consequently they were retained by the complainant who, we are informed in this Court, had subsequently sold them. This judgment, as I have stated, was passed on the 6th of April 1926. It next appears that on the 3rd of May an application was made to the Sessions Judge

by the accused in which it was prayed that his purchased buffaloes may be delivered to him or in the alternative the complainant may be directed to execute a bond till the disposal of the title to the said buffaloes, by a Civil Court. On this the learned Sessions Judge after hearing Counsel recorded the following order: "I came to the conclusion that the buffaloes had actually been stolen, though the evidence against the petitioner was not complete. I, therefore, declined to interfere." This order as I have stated was dated 3rd May, 1926. It was not, however, till the 16th June, that a petition was presented to this Court against that order and a rule was issued on the grounds stated in the petition —these grounds being (1) that the buffaloes not having been found to be the subject of theft, and that the petitioner having been acquitted of the charge under ss. 379 and 411, Indian Penal Code, and being *bona fide* in possession of the said buffaloes under his auction-purchase the said possession should be confirmed to him; (2) that in absence of any satisfactory evidence to prove that the buffaloes belonged to the complainant, the Court below should have itself retained the custody of the buffaloes, or have made over the custody to the petitioner, and that the learned Sessions Judge has erred inasmuch as he did not come to any finding on this matter; (3) that the Court below should have at least directed the complainant to execute a fresh bond till the disposal of the question of title to the buffaloes by a Civil Court.

Now it is, no doubt, an ordinary rule of law that when an accused is acquitted of a charge of theft and the property found with him is not found to be the subject of theft he is entitled to recover that property. Now here, as a matter of fact, the findings of both the Courts which we must accept as findings of facts, are that these buffaloes were the property of the complainant. When they strayed away they somehow got into the Alipore pound and they were sold for Rs. 69 the price which appears to us to be most inadequate. The question then is whether the Sessions Judge has been unreasonable in refusing to hand them over to the accused. In view of his findings of fact and the special circumstances of this case specially as very great suspicion is found by him and by the Court below as to the *bona fides* of the proceedings at the Alipore Cantonment pound, we cannot say that his order is unreasonable and under the special circumstance of this case, therefore, we do not think that we should interfere. There is also another reason and that is this;—though, no doubt, an application to the Sessions Judge was made within the time allowed by the law and customs of limitation and an application in revision to this Court within the time within which this Court hears revisional matters there has been undoubtedly great delay with the consequence that the buffaloes have passed into others' hands and that is another reason why we should not exercise our revisional power in this matter. That disposes of the first two grounds. As to the third ground, namely, that the Court below should have directed the complainant to execute a fresh bond till the disposal of the question of title to the buffaloes, by a Civil Court, we have not been shown any authority under the Code which would entitle us or the Court below to pass such an order. In the result the Rule is discharged.

Roy, J.—I agree.

A. N. A. *Rule discharged.*

LAHORE HIGH COURT.

CRIMINAL REVISION No. 1166 OF 1926.

October 22, 1926.

Present:—Mr. Justice Harrison.

ATTAR SINGH—ACCUSED—PETITIONER

versus

HARI SINGH—COMPLAINANT AND

DASONDHA SINGH—ACCUSED—

RESPONDENTS.

Cr. P. C. (Act V of 1898), s. 137—Public nuisances, proceedings relating to—Evidence, necessity of recording.

The provisions of s. 137, Cr. P. C., are imperative and a Magistrate is bound to record evidence as in a summons case in proceedings relating to public nuisances before making an order absolute under the section.

Case reported by the Sessions Judge, Ambala, with his No. 1185-G of 18th/22nd July, 1926.

FACTS.—On 8th February, 1925, one Hari Singh Saini of *Mouza* Bazidpur lodged a complaint under s. 133, Cr. P. C., for removal of an obstruction caused by Dasondha Singh and Attar Singh, Sainis of the said village by narrowing the public lane having constructed a wall and a house

thereon. The complaint was sent for preliminary enquiry to the *Zaildar*. On 25th March, 1926, the Sub-Divisional Magistrate on the *Zaildar's* report, dated 16th March, 1926, ordered that Dasondha Singh and Attar Singh should remove the obstructions by the 10th April, 1926, or in case of any objection they should appear before the Court on the said date at Rupar and move it to have the said orders set aside or modified. The respondents appeared before the Sub-Divisional Magistrate and filed their objections. Thereupon the case was sent to the *Naib Tahsildar* for report. On 19th May, 1926, on receipt of *Naib Tahsildar's* report the Magistrate made his order dated 24th March, 1926, absolute under s. 137 (3), Cr. P. C., and ordered the obstructions to be removed by 15th June, 1926.

GROUNDS.—This is a petition for revision of the order of Mr. Fairlie, Sub-Divisional Magistrate, Rupar, making a provisional order absolute under s. 137 (3), Cr. P. C., on the ground that he had not recorded any evidence himself for the prosecution. This contention is correct. There are only two reports on the record, of the *Zaildar* and the *Naib Tahsildar* together with the statements recorded by these two officials.

The Magistrate should have proceeded as in a summons case and taken evidence in the matter. Section 137, Cr. P. C., is imperative in this case, *vide Sita Ram* v. *Emperor* (1) and *Sarojbasini Devi* v. *Sripati Charan Chowdhury* (2) and the order passed by the Magistrate is illegal. The proceedings of the lower Court are accordingly submitted to the High Court with the recommendation that the order be set aside and the Magistrate be directed to proceed according to law.

Mr. *Shamair Chand*, for the Petitioner.

Mr. *G. S. Salariya*, for the Respondents.

ORDER.—For the reasons given by the learned Sessions Judge I set aside the order in question and direct the Sub-Divisional Magistrate to dispose of the case in accordance with the law.

R. L. *Petition accepted.*

(1) 41 Ind. Cas. 1000; 32 P. R. 1917 Cr.; 18 Cr. L. J. 888; 43 P. W. R. 1917 Cr.

(2) 28 Ind. Cas. 799; 42 C. 702; 19 C. W. N. 332; 16 Cr. L. J. 415.

SIND JUDICIAL COMMISSIONER'S COURT.

CONFIRMATION CASE No. 8 OF 1926.
CRIMINAL APPEAL No. 88 OF 1926.
October 1, 1926.

Present:—Mr. Kincaid, J. C., and Mr. Barlee, A. J. C.

AHMED AND OTHERS—ACCUSED—APPELLANTS
versus
EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 149, 302, 326 —"Common object", meaning of—Unlawful assembly —All members, whether should be convicted of same offence.

Section 149 of the Penal Code must be construed strictly and the expression 'offence committed in prosecution of the common object' must be confined to something immediately connected with the common object. [p. 95, col. 2.]

Queen v. *Sabid Ali* (1), relied upon.

It is not necessary that all the members of an unlawful assembly should be found guilty of and convicted for, an offence of which the principal offender is convicted or else that all the accused must be acquitted. It is permissible to convict some of them of a minor offence which is included in the offence for which the principal is convicted. [p. 96, col. 1.]

A conviction of a principal offender of murder and the other members of an unlawful assembly of grievous hurt is not illegal. [p. 96, col. 2.]

Barkau Sing v. *Emperor* (3) and *Behari* v. *Emperor* (4), relied upon.

Ram Prasad Singh v. *Emperor* (2), dissented from.

Appeal against the conviction and sentence by the Sessions Judge, Hyderabad, dated the 4th June, 1926.

Mr. *Partabrai D. Punwani*, for the Appellants.

Mr. *T. G. Elphinston*, Public Prosecutor for Sind, for the Crown.

JUDGMENT.—The facts of this interesting case are shortly as follows:—

A certain girl called Amnat aged about 17 had been married to one Ghulam Mahomed. She was the sister of the complainant Abdulla and her sister Fatma was married to one Haji Hashim the brother of Ahmed, the present appellant No. 1. Ahmed wanted to marry Amnat himself, but as it often happens in Sind, her family refused to allow her marriage to Ahmed because they wished to secure the daughter of Ghulam Mahomed for Abdulla's own son Mahomed. Ahmed, however, would not give up his purpose of marrying the girl Amnat. About 2 A. M. on the 15th of December, 1925, he and 7 or 8 other men came to the house of Abdulla Amnat's brother. Four of these went inside and dragged out the girl; four remained outside in the shed. Amnat cried out and the mem-

bers of her household came to her help, but were beaten of. Ahmed and his friends then dragged the girl towards where the two mares were standing, one of which was his own and one of which he had borrowed from the witness Mewo. The noise of the scuffle and the cries of Amnat roused the neighbourhood. A man called Dino Sheikh who was sleeping in the neighbouring shed, rushed off to the scene and tried to rescue Amnat. As he rushed up Ahmed struck him a violent blow with his axe that killed him on the spot. The girl Amnat was put on one of the mares and Ahmed led it. Allahwarayo his cow-herd rode the other mare. They rode all night and about midday on the 15th of December they reached the village of Ghulam Mahomed Nizamani. Their companions scattered in other directions. All these three persons stayed there for a night and two days. In the meantime, however, events had taken place elsewhere. Abdulla and Ghulam brother and husband of the ravished girl went to the *zemindar* Allah Baksh about 4 A. M. on the night of the 15th of December. They complained to the *zemindar* that Amnat had been forcibly carried away and that a murder had been committed. They mentioned the names of Ahmed, his cow-herd Allahwarayo and of Sultan a servant of the *zemindar* Allah Baksh. The *zemindar* asked him how they had identified Sultan and they said that he had received injuries and had fallen down and got up again. They said that there were other men with him but that they could not identify them. The *zemindar* bade them go and report the matter to the Police. They went off to do so. After they had left, Allah Baksh wrote letters to the neighbouring *zemindars* including Ghulam Mahomed Nizamani warning them to keep watch and arrest, if they could, the fugitives. Abdulla went to make his report at Kario Ganwhar. He reached it on the 15th of December at 5 A. M. It was still dark but the Head Constable who was in charge took down his report and in it he recorded the names of Ahmed, Allahwarayo and Sultan all of which were given to him by the complainant. The Head Constable went to the scene of crime which he reached at 6-30 A. M. He collected *mashirs* and trackers. He held an inquest and sent the deceased's body with one Muso Khan the Constable to the Hospital. The body reached the Hospital on the 16th of December, 1925, and the Medical Officer, Mr. Jaikishindas, held a *post mortem* at 11-55 A. M. on the morning of the 16th of December. He found two incised wounds on the body of which the first was a serious one. It severed the spinal cord on the left side of the neck. It was the cause of deceased Dino's death.

After sending the deceased's body to the Hospital, Mahomed, the Head Constable, sent for Allah Baksh and with him went to track the foot-prints. In the meantime, however, Ghulam Mahomed Nizamani had received the letter of Allah Baksh. Indeed he had already suspected Ahmed and Allahwarayo and had induced them to wait in the neighbourhood of his village until he decided what he should do with them. On receiving Allah Baksh's letter he wrote back to Allah Baksh and when the latter received it he left for Ghulam Mahomed Nizamani's village at once. On meeting Ghulam Mahomed Nizamani the two *zemindars* went to the place where Ahmed and Amnat were and brought them to Satiani in the Mirpur Bathoro *taluka* where he handed them over to the Police. Ghulam Mahomed Nizamani being anxious that Ahmed and Amnat should not ride away without his knowledge had taken the precaution to send Allahwarayo and the mare to the village called Ghunghada. After the handing over of Ahmed and Amnat to the Police, Abdulla went to Ghunghada and took Allahwaryo back with him to Khathar, where he handed him over to the Police. At first the Sub-Inspector and then the Inspector took up the inquiry. In the end some eight persons were arrested and were sent to trial before Mr. Sanders, the Sessions Judge, Hyderabad. After recording a careful judgment, the learned Sessions Judge acquitted five of he accused and convicted the three appellants Ahmed, Allahwarayo and Sultan. They have appealed here. The learned Judge convicted Ahmed of rioting, abduction with intention to compel marriage with causing simple hurt to Haji Majid and two others and with the murder of Dino Sheikh. Ahmed he sentenced to be hanged by the neck until he was dead under s. 302, to two years' rigorous imprisonment under s. 147, to four years' rigorous imprisonment under s. 366 and to three months' rigorous imprisonment under s. 323.

He found Allahwarayo guilty under the same sections but sentenced him to transportation for life under s. 302 read with s. 149 and to one year's rigorous imprisonment under s. 147 to three months' rigorous

imprisonment under s. 323 and to two years' rigorous imprisonment under s. 366.

He found Sultan guilty under the same sections as Allahwarayo and inflicted the same sentences on him.

Mr. Partabrai who appears for all the three appellants has very fairly said that he would not question the correctness of the Sessions Judge's finding as to the participation of the crime committed by Ahmed and Allahwarayo. We think that their presence at the crime and their participation in it is the only possible conclusion to which we can come. Ahmed was found in the possession of the girl Amnat. Allahwarayo was in charge of the two mares one mare has been identified, as Ahmed's, the other mare as Mewo's, the man from whom Ahmed borrowed it. Amnat herself has implicated both the two men.

The learned Pleader, however, has maintained that the evidence upon which Sultan has been convicted was not sufficient. Sultan has, however, been identified by all the eye-witnesses. His name was given to Allah Baksh *zemindar* at the earliest possible moment. His name was entered in the First Report and his foot-prints were identified on the spot. The learned Pleader has relied upon the statement made by the complainant to Allah Baksh that in the fight Sultan received injuries. Whereas actually when he was arrested no injuries were found on him. We do not, however, attach the same importance to this discrepancy as the learned Pleader. We think it quite possible that in the struggle, that occurred during that night the eye-witnesses might well have identified Sultan yet may have wrongly thought that he received a more serious injury than the one he actually did.

The next question that demands our consideration is the offence which these three appellants have committed.

As regards Ahmed there is no doubt in our minds that Dino rushed up to rescue the girl. He struck Dino so violent a blow on the neck that he severed the spinal cord. The man who strikes a blow like that must have the intention of killing his assailant. We, therefore, find that Ahmed was guilty of murder.

As regards the sentence, it must be remembered that he had no right whatever over Amnat. She was not an unmarried girl. She was admittedly the wife of Ghulam Mahomed. Whatever feelings towards her he may have borne he was not justified in raiding her brother's house, carrying her off and in killing a man who was trying to rescue her. We, therefore, confirm the sentence passed on Ahmed by the learned Sessions Judge and dismiss his appeal.

The cases of Allahwarayo and Sultan present more difficulty. The learned Sessions Judge has found that under s. 149 read with s. 302 they were guilty of murder. We think, however, that this was an unduly severe view to take of their offences. Section 149, we think, ought to be strictly construed. It runs as follows:—

"If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence."

We do not think that it can be said that Ahmed struck Dino a fatal blow strictly in prosecution of the common object of the assembly. We take it that the prosecution of the common object must mean something immediately connected with the common object. If some act committed by Ahmed while actually dragging the girl off had led to the death of some body, that offence, no doubt, has been committed in prosecution of the common object of that assembly. But here the girl had actually been taken away and the violent blow struck by Ahmed was something outside the prosecution of the common object of the assembly.

Next we doubt whether the members of this assembly knew that murder was likely to be committed in the prosecution of the common object. After all, it is not every gun-shot or every hatchet blow that caused death. I think it will be fairer for us to hold that whilst the members of this assembly knew that grievous hurt was likely to be committed in prosecution of their common object, they did not know that murder was likely to be committed in prosecution of that object. We are fortified in this view by the case of *Queen* v. *Sabid Ali* (1). In that case a body of armed men had gone out to eject the party of one Fukeer Baksh from a field in dispute. In

(1) 20 W. R. Cr. 5; 11 B. L. R. F. B. 347.

the course of the riot that followed one of them fired a gun and caused the death of one of Fukeer Baksh's party. The view of the learned Judges of the Calcutta High Court which was expressed by Phear, J., at page 9* was as follows:—

"But it seems also clear that murder, or even the taking of life, was not *immediately* connected with the common object of the unlawful assembly of which the prisoners were members. That common object was, as the Judge expresses it, to drive Fukeer Baksh off the land and to prevent him from cultivating it. There is, however, nothing in the evidence to indicate that the members of the assembly were prepared, and intended to accomplish that object at all hazards of life. I do not think that they intended to attain the common object by means, if necessary, of murder,..... This being so, I find myself unable, to arrive at the conclusion, that murder was committed in prosecution of the common object of the unlawful assembly within the meaning of the first part of the section.

"Neither do I think it is satisfactorily made out by the evidence that the prisoners knew it to be likely that this offence of murder would be committed in the prosecution of the common object of the assembly within the meaning of the second part of the section, taking that object to be the driving Fukeer Baksh off the land. It was *a priori* possible, and indeed most probable, that that object would be effected without any risk of life whatever."

The next question arises whether the accused can be found guilty under s. 326 read with s. 149. It is certain that persons who go out armed as the party of the accused went out in this case, must know that grievous hurt is likely to be committed in prosecution of their common object when that common object is the abduction of another man's wife. The learned Public Prosecutor to whom we are much obliged for the assistance given in this matter has pointed out the case of *Ram Prasad Singh* v. *Emperor* (2) where the Patna High Court took the view that the other members of the unlawful assembly would only be convicted of the same offence as that of which the principal had been convicted. In other words it is only open to us either to convict Allahwarayo and Sultan under s. 302 read with s. 149 or to acquit them. With all deference to the learned Judges, we find ourselves, unable to accept their reasoning. The offence of murder includes the offence of grievous hurt. In this particular case Ahmed was guilty of grievous hurt as well as of murder and he could have been convicted quite lawfully either of an offence under s. 302 or of an offence under s. 326 in relation to the death of Dino. Thus the offence of grievous hurt was committed by a member of the unlawful assembly and it was the offence which the members of the assembly knew was likely to be committed in prosecution of the common object of that assembly, every person who was a member of the same assembly was guilty of that offence. The learned Judges of the Patna High Court observed that they could find no authority for this view. The learned Public Prosecutor, has, however, drawn our attention to two cases where Judges of other Courts have regarded the section from the same point of view as ours. In the case of *Barkau Sing* v. *Emperor* (3) the principal was found guilty of culpable homicide not amounting to murder and the other members of the unlawful assembly were found guilty under s. 325 and s. 149. In the case of *Behari* v. *Emperor*, (4) a case from Allahabad High Court the principal was convicted under s. 302 and the other members of the unlawful assembly under s. 326 read with s. 149.

There is thus the authority of two Courts in this country in support of our view and we think that it is a reasonable one. It enables the Court to temper justice with mercy on the one hand and on the other hand to avoid the acquittal of persons clearly guilty.

We, therefore, change the conviction in the case of Allahwarayo and Sultan from the conviction under s. 302 to conviction under s. 326 read with s. 149 of the Indian Penal Code. We alter the sentence inflicted on them from transportation for life into a sentence of five years' rigorous imprisonment. These sentences shall run concurrently with the other sentences inflicted on them by the learned Sessions Judge of Hyderabad.

P. B A. *Order accordingly.*

(2) 71 Ind. Cas. 113; 1 Pat. 753; 4 P. L. T. 213; A. I. R. 1923 Pat. 50: 24 Cr. L. J. 65.

(3) 60 Ind. Cas. 679; 7 O. L. J. 671; 22 Cr. L. J. 279.

(4) 83 Ind. Cas. 714; A. I. R. 1924 All. 670; L. R. 5 A 113 Cr.; 26 Cr. L. J. 154.

*Page of 20 W. R. Cr.—[*Ed.*]

OUDH CHIEF COURT.

CRIMINAL MISCELLANEOUS APPLICATION
No. 38 OF 1926.
November 4, 1926.

Present:—Sir Louis Stuart, KT., Chief Judge.

LAL HARI HAR BAKHSH SINGH—
ACCUSED—APPLICANT
versus
EMPEROR—OPPOSITE PARTY.

Cr. P. C. (Act V of 1898), s. 526—Transfer—Magistrate acquainted with enmity between prosecution and accused—Magistrate frivolously summoned as witness—Transfer of case, whether justified.

The circumstance that a Magistrate in his capacity of a Sub-Divisional Officer knows the existence of enmity between the prosecution and the accused and that the accused desires to cite the Magistrate to depose to that enmity cannot be held to be a sufficient ground for transfer of the case to another Magistrate.

Application for transfer under s. 526, Cr. P. C.

Messrs. *A. K. Muhruf* and *S. N. Roy*, for the Applicant.

Mr. *G. H. Thomas*, Government Advocate, for the Opposite Party.

JUDGMENT.—I am obliged to go to a certain extent into the points of this prosecution. I do not propose to express any opinion as to the merits of those points. The accused in this case is Lal Hari Har Bakhsh Singh, a *zemindar* of the Gonda District, whose position is such that he is locally known as the Raja of Sagrahgarh. The case against him is that he has been harbouring absconded offenders. From the very commencement his defence has been that the case is the result of his enmity with a certain Durga Bharthi. He has asserted that Durga Bharthi has for some time been lying in wait to implicate him on a false charge and that he has succeeded in causing these proceedings to be instituted against him groundlessly after suborning certain of the accused's own tenants to give evidence against him. The case has been spun out to a very great length and has been before the Court on some sixteen occasions. The defence evidence commenced on the 13th of September and defence witnesses were heard on the 13th September and the 22nd September. On the 4th October the accused stated that he wished to examine the trying Magistrate as a witness for the defence and asked that in these circumstances the case should be transferred for decision to another Magistrate. It is obvious that if the trying Magistrate is heard as a defence witness in the case the decision of the case must be made by another Magistrate, as the trying Magistrate cannot be expected to decide on the value of his own evidence. The District Magistrate having refused to transfer the case, the accused has applied for a transfer to this Court. I have endeavoured to ascertain the points upon which the accused wishes to examine the trying Magistrate and I find that the points are these. It is suggested that the Magistrate can give valuable evidence as to the existence of the enmity between the accused and Durga Bharthi and that the Magistrate can further depose that on one occasion the accused had told him that he apprehended that Durga Bharthi will bring a false case against him. The third point is that the Magistrate can give evidence that Durga Bharthi had given information against the accused in this case. All these are facts, which might well be known to any Sub-Divisional Officer in his executive capacity. The existence of a village feud may well be within the knowledge of a Sub-Divisional Officer. Statements of apprehension that a false case will be brought against a man are made very frequently and the examination of Police papers must necessarily show who is said to have given information in the first proceedings in a case. But the circumstance that the Sub-Divisional Officer has such knowledge in no way debars him from hearing and deciding such a case; and under the present conditions of administration in India, if these considerations were held to be sufficient to debar a Magistrate from hearing a case, a Sub-Divisional Officer would very frequently be debarred from deciding the cases which he is expected to decide. I find that, put at its highest, the evidence given by this Magistrate would not be of the slightest value in the case and I do not believe that the application to summon him was a genuine one. If the accused really believed that the learned Magistrate knew too much about the facts to justify his hearing the case he had that knowledge when the case commenced. Why then did he permit the case to go on over some sixteen hearings before he put in an application which, on the face of it, would involve a transfer? I look upon this application as frivolous. I reject the application for a transfer, order the record to be returned and direct that the proceedings continue,

Under the provision of s. 526 (6 A) of the Cr. P. C. as I consider the application frivolous I direct the applicant to pay Rs. 150 the costs incurred by the Crown in defending this application.

G. H. *Application rejected.*

SIND JUDICIAL COMMISSIONER'S COURT.

ACQUITTAL APPEAL No. 128/4 OF 1926.

October 4, 1926.

Present:—Mr. Kincaid, J. C., and Mr. Barlee, A. J. C.

EMPEROR—PROSECUTOR—APPELLANT

versus

SARAN—ACCUSED—RESPONDENT.

Penal Code (Act XLV of 1860), s. 366—Seduction—Each illicit intercourse, whether seduction—Accused, how far bound to disclose his defence during course of prosecution evidence—Cr. P. C. (Act V of 1898), s. 423 (1) (a)—Acquittal—Appeal—Appellate Court, power of, to convict without re-trial.

On each occasion that a woman is persuaded to indulge in illicit intercourse, she is being seduced within the meaning of the term "seduction" in s. 366 of the Penal Code and it is not a correct proposition that once a girl has lost her chastity she cannot be seduced. [p. 100, col. 1.]

An accused person is not bound to plead in detail until called on to enter on his defence, but he can reserve his defence at his risk, inasmuch as the Crown witnesses must be given an opportunity of denying any allegations against them which form a part of the defence. [p. 100, cols. 1 & 2.]

When a person is tried by a Judge and a Jury and acquitted and there is an appeal against his acquittal, the Appellate Court is not bound to order a re-trial but may find him guilty on the evidence before the Court and pass a sentence on him. [p. 101, cols. 1 & 2.]

Makin v. *Attorney-General for New South Wales* (2) and *Wafadar Khan* v. *Queen-Empress* (3), not followed.

Queen-Empress v. *Ramchandra Govind* (4), *Emperor* v. *Murid* (6) and *Topandas* v. *Emperor* (7), relied upon.

Appeal against an order of acquittal by Tyabji, A. J. C.

Mr. *T. G. Elphinston*, Public Prosecutor, for the Crown.

Mr. *Gopaldas N. Lalla*, for the Accused.

JUDGMENT.—The respondent, Saran, was tried by a Judge and Jury of this Court on a charge under s. 366A, Indian Penal Code, and acquitted. Under instructions from the Local Government the Public Prosecutor for Sind has appealed on the ground that by reason of a misdirection or of a misunderstanding of the law on the part of the Jury the charge of the learned Judge led to an erroneous verdict within the meaning of s. 423 (2), Cr. P. C., such as to warrant the reversal of the verdict and the conviction of the accused.

The facts of the case are simple. The accused was admitted by a procuress by profession. She became acquainted with a minor girl named Roshan Jan, who had come to Karachi from Peshawar with a woman named Meraj. On the 25th January last she sent word to a Bania, named Govind that she had a nice girl for him. They went together in a carriage to the house of Meraj. Roshan Jan entered the carriage and they drove her to the accused's house. When they arrived there they were stopped by Police Officers, who had been waiting for the accused. It had been reported that the accused was procuring minor girls, and they had gone to her house to investigate. The accused was put on her trial before the City Magistrate, Karachi, for an offence under s. 372, Indian Penal Code. Roshan Jan deposed that the accused had called her out to go for a drive, that she had obtained the permission of Meraj, and had gone with her; that a Bania had been sitting in the carriage; that the accused had told her to let him have sexual intercourse with her and that she would be paid Rs. 5. In addition she said that once before the accused had asked her to go for a drive, and that, on arriving at the accused's house a Mussalman had paid her Rs. 10 for sexual intercourse.

Roshan gave this evidence on the 1st of February and on the same day the City Magistrate recorded the evidence of the Bania Govind, and of the Sub-Medical Officer Civil Hospital. The former corroborated the girl; the latter proved that she was under 15. The only question asked in cross-examination was as to the fee which Govind had agreed to pay. The accused was questioned the same day, and she admitted

(1) that she had sent to tell Govind that she had a girl for him;

(2) that she had taken Govind to the house of Meraj and had asked Roshan Jan to accompany her and Govind in the carriage;

(3) that she had arranged with Roshan Jan that she should have sexual intercourse in her house with Govind, and be paid Rs. 5;

(4) that she had arranged with Govind to let him have intercourse with Roshan Jan for Rs. 5 in her house.

When asked had she any more to say she said "I have nothing to say."

That ended the proceedings for the 1st February. But the Magistrate recalled Roshan and examined her again on February 15th. On February the 23rd she was cross-examined at some length as to her past history. Her evidence shows that an attempt was being made to prove that she was a prostitute and Meraj a brothel keeper. The accused was again examined and on that occasion she stated that Meraj and Roshan had come to her and had lived for a month with her and that Roshan had gone out daily to earn money as a prostitute.

The Magistrate then framed a charge under s. 366A to the effect that the accused had induced Roshan to go from the house of Meraj with the intention that she might be seduced to have illicit intercourse with Govind. She was placed on her trial on May 12th and pleaded not guilty. The trial went on up to the 15th. Roshan Jan and Meraj were cross examined at length and the answers given by them show that it was the defence case that the latter kept the former as a prostitute. On the 14th the accused was questioned by the Court. She then said that she had told the Magistrate that "the Rs. 5 which were being arranged for with the Bania were arranged with Meraj and not with Roshan Jan though Roshan Jan was present". She admitted that what she had said to the City Magistrate was correct. Presumably she meant to include the statement about Meraj which in fact she did not make.

It is noteworthy that in the course of the cross examination of Roshan and Meraj in the Sessions Court not a single question was asked to show that it was the defence that it was Meraj and not the accused who had induced Roshan Jan to go from the former's house with the accused. The only passage on this subject is in the cross-examination of Meraj before the City Magistrate on the 15th February, when she said "Roshan Jan's mother left her with me.....I do not know that the accused had taken Roshan away. *She never* asked me permission to do so." It is doubtful whether she was referring to accused or to Roshan Jan.

On the 15th May the learned Judge charged the Jury. The learned Public Prosecutor criticises the charge on the following grounds:—

1. That the learned Judge misdirected the Jury in that he repeatedly told them that what they had to decide was whether the accused induced Roshan to indulge in illicit intercourse, whereas s. 366A only required the prosecution to prove that the girl was induced to go from any place, the other ingredients of the offence being facts which were admitted by the accused.

2. That 75 per cent. of the charge dealt with the question of deciding the intention of the accused which was wholly irrelevant in view of her admission of necessary knowledge.

3. That there was also non-direction which amounted to misdirection on three material points:—

(*a*) That nowhere did the learned Judge refer to the question of knowledge;

(*b*) that the learned Judge never referred to the evidence or to the admission of the accused.

(*c*) that he did not charge the Jury that consent in the case of a minor girl is immaterial.

Lastly the learned Public Prosecutor has complained that the learned Judge allowed cross-examination to show that the girl was not being seduced from the path of virtue for the first time, which was irrelevant. He has contended that these errors of commission and omission caused a failure of justice.

In my opinion the only objections which are of practical importance are the license allowed to the defence Pleader in cross-examination and the omission of the learned Judge to put the facts of the case clearly before the Jury. The rest seem to us to be unimportant and I shall deal with them briefly. It is true that at line 110 of the charge the learned Judge told the Jury that the gist of the law was that no one should induce a minor girl to have illicit intercourse and at line 250 he said "if you accept the evidence that Roshan Jan was a respectable woman you can have no hesitation in coming to the conclusion that Saran did induce her to this act of illicit intercourse" There are several such passages. But at the beginning and end of the charge and at other places the learned Judge stated the law correctly that the prosecution had to prove merely an inducement to leave the house of Meraj with the intention that she should be seduced; and I do not think that the Jury can have made a mistake about the ingredients of

the offence charged. It was never alleged that there had been any actual intercourse. Similarly the insistence in intention and the omission to refer to knowledge were in the circumstances of this case immaterial. It was never denied that Saran's intention was to submit Roshan Jan to intercourse.

Before coming to the main point I must speak of the cross-examination to character. It was, as is now admitted, the defence throughout that no offence under 366A could have been committed because Roshan Jan was a prostitute. The learned Pleader for the accused submitted the proposition that once a girl has lost her chastity she cannot be seduced since she has no chastity to lose. That question was decided against him by the learned Judge, and in our opinion correctly. It is true that seduction means to persuade a woman to surrender her chastity, and it has been held in a case quoted by Ratanlal (page 76) that once a woman has lost her chastity and become a prostitute she cannot be seduced again. But we think that the Legislature cannot have intended to restrict the meaning of the word so narrowly. Interpreted in this way the section can afford little protection to children, and yet obviously the Legislature intended to protect children. Their intention can be given effect to by the adoption of the alternative definition from the Oxford Dictionary "to tempt into sin". We think that on each occasion that a woman is persuaded to indulge in illicit intercourse she is being tempted into sin and so seduced in this wider sense; and we find authority for this view in the case of *King-Emperor* v. *Nga Ni Ta* (1) referred to by Mr. Ratanlal in his commentary under s. 366.

Prima facie, then, the cross-examination to character was irrelevant, and the learned Judge would have been well-advised to make the defence Pleader show the relevancy of his questions before allowing him to ask them. Had he done so the Public Prosecutor would not have been taken by surprise by the second line of defence that it was Meraj and not the accused who had asked the girl to go with the Bania. It is true that considerable latitude is given to accused persons and that they are not bound to plead in detail until called on to enter on their defence. But they reserve their defence at their own risk; as there is a well-known equitable rule that Crown witnesses must be given opportunities of denying any allegations against them which form a part of the defence. This rule was not obeyed in this case, and, in cosequence of this the accused was not entitled after the case for the Crown was closed to set up a defence which had not been indicated by the cross-examination. We think, then, that much of the cross-examination was totally irrelevant.

The last and most important objection is that the learned Judge did not clearly explain the case to the Jury, and did not attempt to disabuse their minds of the idea that the character of Meraj and Roshan Jan were relevant facts. It is true that he was at pains to make it clear that "because a girl is leading a bad life it would be absurd to hold that, therefore, she cannot be seduced to illicit intercourse". Nevertheless he told the Jury to pay attention to the antecedents of the persons concerned and clearly he included Meraj amongst them. It seems to us, then, that he accepted and allowed the Jury to accept the second defence as genuine and worthy of their consideration. But, in our opinion, it was a defence which was not open to the accused, and the Jury should have been so directed; at the best the learned Judge should have taken them through the evidence, and pointed out that this particular defence was not set up till the end of the case, was not supported by evidence, but rested on one bare statement of the accused, and was entirely contradictory to the first statement made by her. Instead he dwelt on the character of the girl and practically told the Jury that; if they thought that Roshan Jan was not an innocent girl, they were at liberty to find that she had not been tempted but "had gone of her own accord and owing to her own bad impulse or her lust for money or otherwise". That was, of course, the question for decision. The accused had pleaded not guilty, and it had to be left to the Jury. But to prevent a failure of justice it was of the utmost importance to impress on the Jury that on the 1st February, after hearing the evidence of Roshan Jan, the accused had admitted that she had gone to the house of Meraj to obtain Roshan Jan for illicit intercourse, had asked her to go with her in the carriage, and had told her that she would be paid Rs. 5. These admissions, in our opinion, amounted to a

(1) 10 Bur. L. R. 196; 1 U. B. R. (1902-03), Penal Code, 15.

plea of guilty, and the Jury should have been so directed. The omission of the learned Judge to do so was, in our opinion, a misdirection, which has caused a miscarriage of justice.

The next question is whether we are bound to order a fresh trial or have power to find the accused guilty and to pass sentence. It has been argued by the learned Pleader for the defence that the only course open to us is to order a new trial. He has diligently collected a number of authorities on the point, principally the judgment of the Privy Council in *Makin* v. *Attorney-General for New South Wales* (2) referred to and relied on by a Bench of the High Court of Calcutta in *Wafadar Khan* v. *Queen-Empress* (3). The decision was to the effect that if a person is entitled to be tried by Jury, a Bench of Judges cannot substitute their own verdict for a Jury verdict. But this view has not been consistently held even by the Calcutta High Court and has not been adopted in Bombay. It was considered in *Queen-Empress* v. *Ramchandra Govind* (4), where it was decided that, when part of the evidence which has been allowed to go to the Jury is found to be irrelevant and inadmissible it is open to the High Court in appeal either to uphold the verdict upon the remaining evidence on the record under s 167, Indian Evidence Act, or to quash the verdict and order retrial. Referring to *Makin's case* (2) their Lordships remarked: "The present decided inclination of our opinion.....is that the language used by the Judicial Committee in the case from New South Wales does not apply to the Codes of India. In *Reg.* v. *Ramaswami Mudaliar* (5) this Court ordered a new trial, as the evidence was of such a character as to render it difficult to pronounce on its character without hearing the witnesses. It has been conceded..... that the present case differs: the evidence is one-sided and practically undisputed: the result depends on the inference from that evidence,.....we see no reason...for ordering a fresh trial."

In the case of the *Emperor* v. *Murid* (6) the Bombay practice was followed, and we have been referred to another Sind case *Topandas* v. *Emperor* (7). There is, therefore, ample authority to support the view that a High Court in these circumstances has jurisdiction to decide the case instead of ordering a new trial.

Moreover, apart from authority it is the view which we are inclined to take. Section 423 (*i*) (*a*) seems to us to be quite clear, and we do not think that we need look any further. This question is one which has been before the High Courts for many years, and the presumption is that had the Legislature thought that the Courts were claiming too extensive powers, they would have altered the section at the last revision of the Code. Mr. Gopaldas has argued that no Appeal Court has ever substituted its decision for a verdict unless the accused has waived his right to a fresh trial. In no case he says, has a High Court set aside an acquittal and convicted an accused. But we are unable to accept his distinction. Trial by Jury is not in India the birth right of the individual but is the creation of Statute; and the Crown has as much right to a Jury as an accused. If then, this Court has jurisdiction to acquit a person who has been convicted by a Jury, it may convict him. Whether it should convict or order a new trial is a matter for consideration in each case; and when a case is complicated a fresh trial may be advisable. But in a simple case such as that of the *Crown* v. *Murid* (6) a fresh trial can only cause unnecessary trouble and expense.

The present case is certainly one which ought to be disposed of at once. Mr. Gopaldas has taken us through the evidence with great care to show that Roshan Jan was unworthy of credit and that her uncorroborated word should not be accepted in preference to the accused's. But unfortunately for the accused her own version was identical with that of the girl. She admitted that she had asked Roshan Jan to accompany her intending her for illicit intercourse and that she told her as an inducement that she would be given Rs. 5. Thus all the ingredients of the section were admitted except the girl's age, and that has been proved to be less than 18. It seems to us that it would be absurd to order a fresh trial. We set aside the acquittal and convict the accused of an offence

(2) (1894) A. C. 57; 63 L. J. P. C. 41; 6 R. 373; 69 L. T. 778; 17 Cox C. C 704; 58 J. P. 148.
(3) 21 C. 955; 10 Ind. Dec. (N. S.) 1269.
(4) 19 B. 749; 10 Ind. Dec. (N. S.) 502.
(5) 6 B. H. C. R. Cr 47.
(6) 4 Ind. Cas. 608; 3 S. L. R. 125; 11 Cr. L. J. 15.
(7) 81 Ind. Cas. 249; 25 Cr. L. J. 761; A. I. R. 1925 Sind 116.

under s. 366A, and sentence her to undergo rigorous imprisonment for one year.

P. B. A. *Appeal allowed.*

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 276 OF 1926.
(CRIMINAL REVISION PETITION No. 246 OF 1926.)

September 6, 1926.

Present:—Mr. Justice Jackson.

In re KUNJU *alias* VAITHINATHASAMI IYER—ACCUSED—PETITIONER.

Penal Code (Act XLV of 1860), ss. 193, 196, 417, 511—Debtor purporting to send insured packet containing currency-notes in discharge of debt but actually sending waste paper—Suit on debt—Postal acknowledgment, use of, in support of plea of discharge—Offence, nature of—Magistrate, jurisdiction of, to take cognisance of offence under s. 193 without complaint from Judge—Cheating—Attempt to cheat—Attempt and preparation, distinction between.

A debtor sent to his creditor a registered insured packet purporting to contain currency-notes in settlement of a debt but in reality containing only waste paper. The addressee was thereby induced to acknowledge the receipt of the insured cover. In a suit on the debt by the creditor, the debtor applied to have the Postal acknowledgment admitted in evidence in support of a plea of discharge:

Held, (1) that the facts did not constitute the offence of cheating or attempt to cheat; [p. 103, col. 1.]

(2) that the accused used in a judicial proceeding fabricated false evidence as true and was, therefore, guilty of an offence under s. 193, Penal Code; [p. 103, col. 2]

(3) that the Magistrate could not take cognizance of the offence without a complaint from the Judge before whom the evidence was sought to be used. [*ibid.*]

The actual transaction in such a case is the fraudulent defence of the suit for recovery of the debt, and until this is commenced there is no attempt at cheating, the facts showing merely preparation. [p. 103, col. 1.]

Raman Behari Roy v. *Emperor* (1), *In the matter of the petition of Riasat Ali* (1), *Sadho Lal* v. *Emperor* (3), relied on.

Petition, under ss. 435 and 439 of the Cr. P. C., 1898, praying the High Court to revise the judgment of the Court of Session, East Tanjore Division at Negapatam, in Criminal Appeal No. 3 of 1926, preferred against the judgment of the Court of Sub-Divisional Magistrate, First Class, Mayavaram, in C. C. No. 47 of 1925.

Mr. *K. S Jayarama Iyer*, for the Petitioner.

The Public Prosecutor, for the Crown.

ORDER.—The petitioner has been sentenced to twelve months' rigorous imprisonment under ss. 417, 511, 193 and 511, Indian Penal Code.

Petitioner owed money to the complainant and sent a registered and insured packet purporting to contain currency notes in settlement of the debt. The packet contained waste paper. Complainant sued the petitioner for the debt and the petitioner filed an application in the Court of the Subordinate Judge to receive the complainant's signed acknowledgment of the receipt of the packet as collateral evidence in proof of satisfaction.

The petitioner was charged on the 25th May, 1925, with attempting to cheat the complainant by inducing him to sign the acknowledgment for the receipt, of the offence under s. 417; and on 22nd August, 1925, he was further charged that he caused circumstances to exist as detailed in the charge under ss. 417, 511 and made a document containing a false statement intending that such circumstances and false entry may appear in a judicial proceeding and that they may cause an erroneous opinion to be formed touching the offence of cheating, and the offence under ss. 193, 511, Indian Penal Code.

The Sub Divisional Magistrate should paragraph his judgments. The first three paragraphs set forth the facts. Paragraph 4 describes how the Bench clerk of the Mayavaram Sub-Court proved that in that Court the accused attempted to file the acknowledgment in the course of the Civil suit between him and complainant. In para. 5 the law is discussed. The Sub-Divisional Magistrate refers to the clear rulings in *Raman Behari Roy* v. *Emperor* (1) and *Tularam* v. *Emperor* (2), that the facts of the case do not constitute cheating, but he holds following the Patna ruling in *Sadho Lal* v. *Emperor* (3), that there is an attempt to cheat, though acknowledging that that ruling is dissented from in *Tularam* v. *Emperor* (2). The Magistrate distinguishes that latter case because there it is stated that if the accused was put to the proof of discharge, he might imagine that the acknowledgment of the packet would be some sort of a proof; whereas in the

(1) 73 Ind. Cas. 780; 50 C. 849; 24 Cr. L. J. 684; 28 C. W. N. 252; A. I R. 1924 Cal. 215.

(2) 83 Ind. Cas. 993; 21 A. L. J. 865; 9 O. & A. L. R. 973; A. I. R. 1924 All. 205; L. R. 5 A. 15 Cr.; 26 Cr. L. J. 209.

(3) 31 Ind Cas. 982; 17 Cr. L. J. 272; 1 P. L. J. 391; 3 P. L. W. 99.

present case he actually did attempt to use the acknowledgment for this purpose.

But Sulaiman, J., does not hold that if the acknowledgment was used in a judicial proceeding there would be an attempt to cheat. He holds that in these circumstances the offence of fabricating false evidence might be committed. In the Patna case no reasons are given for holding that the facts constitute an attempt; and it is difficult to understand how the learned Judges could have held (if their attention was particularly directed to this point which is unlikely for they were only considering a petition under s. 439) that the facts amounted to anything more than preparation. There cannot be an attempt unless the actual transaction has commenced. *In the matter of the petition of Riasat Ali* (4). The actual transaction in these cases would be the fraudulent defence of the suit for recovery of the debt; and until then in the picturesque phrase of the Magistrate the accused armed with the Postal receipt was only waiting for his time to bolster it up in a judicial proceeding as a trap door to escape. In short, he was prepared with a defence, but had not as yet attempted to cheat.

The Appellate Court takes this point in its 12th paragraph and finds in its 13th that the offence of cheating, not an attempt to cheat is committed by the representation of the accused that the cover contains currency notes worth Rs. 500 which had induced the addressee to acknowledge the receipt of that insured cover, which is likely to cause harm to the complainant. This is counter to the ruling in *Raman Behari Roy* v. *Emperor* (1) and *Sadho Lal* v. *Emperor* (3), for the Patna Bench agrees that the facts do not amount to a complete offence of cheating. *Arura* v. *Emperor* (5) [which is not a High Court ruling and need not have been cited] is to the same effect. And at the close of para 13 the learned Judge himself refers to ss. 417, 511 although his finding is that the actual offence of cheating was committed. The Judge would have been better advised to follow *Raman Behari Roy* v. *Emperor* (1), for the point is quite plain. The act of signing a Postal acknowledgment by itself is not likely to cause damage. To satisfy the definition of cheating there must be immediate causation, and the act itself must involve the probability. It is not enough to say that the signed acknowledgment is likely to be used so as to cause damage; the act of signing itself must be likely to cause damage. Nor can there be said to have been an attempt as distinguished from a preparation as already shown in discussing the trial Court's judgment.

There remains the second charge under ss. 193, 511, Indian Penal Code.

The Sub-Divisional Magistrate finds in para. 6 that the accused created a false document and actually used it in a judicial proceeding. He filed the Postal receipt in the suit filed against him in the Sub-Court supported by an affidavit, that he had discharged the debt. The charge, however, is that the accused made a false document intending that it might cause an erroneous opinion to be formed touching the offence of cheating. Apparently the Court that the Sub-Divisional Officer had in view was the Criminal Court, which argues a confusion of mind only explicable by the fact that he could not take cognizance of the proceeding in the Civil Court without sanction. Yet, the finding is that accused used a false document in the Civil Court, the completed offence under ss. 196, 193 on which s. 511 has no bearing. The Appellate Court finds as a matter of fact that the accused petitioned the Sub-Court for admitting the receipt and he, therefore, attempted to fabricate false evidence though he did not succeed in it, the offence under ss. 193, 511. This is hardly correct He may not have succeeded in getting the evidence accepted; but he attempted to use as true fabricated evidence, the offence under s. 196. (The Postal acknowledgment was a circumstance caused to exist with the intention of causing an erroneous opinion.)

On these findings of fact it is clear that an offence punishable under s. 193 was committed of which the Sub-Divisional Magistrate could not take cognizance, except on the complaint of the Subordinate Judge. The fact that the Sub-Divisional Magistrate took cognizance of an offence, on a Police charge-sheet under s. 420 on March 5, and the accused attempted to use the fabricated evidence on March 31 does not absolve the Sub-Divisional Magistrate from obtaining sanction when he decided on August 22 to frame a charge under ss. 193, 511. When the facts were brought to the Magistrate's knowledge it was alleged that the

(4) 7 C. 352; 4 Shome L. R. 155; 8 C. L. R. 572; 3 Ind. Dec. (N. S.) 776.

(5) 20 Ind. Cas. 596; 10 P. R. 1913 Cr.; 14 Cr. L. J. 6; 30 P. W. R. 1913 Cr.; 399 P. L. R 1913.

offence was committed in relation to a proceeding in the Sub-Court, and s. 195 (*b*), Cr. P. C., makes sanction imperative.

The petitioner never raised this question in the Appellate Court, but he can hardly be blamed because he is only charged and convicted for fabricating false evidence to mislead the Court in regard to the offence of cheating, and the second charge is really ancillary to the first to bring it into conformity with *Tularam* v. *Emperor* (2). But the offence for which he is really convicted and could only be convicted, is that in relation to the Subordinate Court proceedings.

No doubt in vacating the proceedings on the comparatively trivial charge under s. 511, and preferring to stand his trial for a completed offence under s. 193, the petitioner runs grave risk of enhanced punishment; but that is his own concern.

I find that no offence under ss. 417, 511, Indian Penal Code, has been committed, and if petitioner is to be re-tried under s. 193, Indian Penal Code, sanction should be applied for in the Court of the Subordinate Judge, Mayavaram. The findings and sentence of the Sessions Judge and Sub-Divisional Magistrate are reversed and petitioner is released from his bail. His re-trial must abide the decision of the sanctioning Court.

V. N. V. *Conviction set aside.*

PATNA HIGH COURT.

CRIMINAL REVISION No. 361 OF 1926.

July 5, 1926.

Present:—Mr. Justice Macpherson.

SOBHA MAHTON AND ANOTHER—ACCUSED—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 379—Theft—Removal of property pending civil dispute—Offence.

Section 379 of the Penal Code is of most doubtful applicability to the class of case in which the question of property is in course of determination in a civil suit.

Complainant sued the *raiyat* of a holding and the accused for possession of the holding on the allegation that the *raiyat* had transferred the holding to the accused in the absence of a custom of transferability of occupancy holdings. The suit was decreed but an appeal against the decision was filed by the *raiyat* and it was after the filing of this appeal that the complainant obtained delivery of possession of the holding. Three days thereafter the accused were alleged to have cut and removed the crops growing on the holding. They were thereupon prosecuted and convicted of an offence under s. 379 of the Penal Code. A few days later the appeal filed by the *raiyat* was decreed:

Held, that under the circumstances of the case the conviction could not be upheld inasmuch as the accused had no idea of causing wrongful gain to the *raiyat* or wrongful loss to the complainant, they having cut and removed the crops under the *bona fide* belief that they belonged to the *raiyat*.

Criminal revision from a decision of the Magistrate, Patna, dated the 4th May, 1926, modifying that of the Sub-Deputy Magistrate, Bihar, dated the 21st March, 1926.

Mr. *Harihar Prasad Sinha*, for the Petitioners.

The Government Advocate, for the Crown.

JUDGMENT.—The facts in this case are as follows:—The landlord of the village sued *Musammat* Meghia and the petitioners of whom Rewa Mahton is her son-in-law and Sobha Mahton is his uncle, for possession of a holding which Meghia who was the *raiyat* had conveyed to Rewa, in the absence, it was alleged, of a custom in the village of transferability of occupancy holdings The suit was decreed on the 28th October last and an appeal against the decision was filed by Meghia on the 14th November. On the 22nd November the decree-holder obtained delivery of possession and on the 25th the petitioners are alleged to have cut and removed the crops growing on the holding. Upon the complaint of the landlord's servant, the Sub-Deputy Magistrate of Bihar on the 31st March convicted the petitioners of theft and sentenced them to fine. A few days later the appeal on the suit was decreed and on the 4th May the Appellate Court upheld the conviction under s. 379 but reduced the sentence to a fine to Rs. 5. The present Rule was granted for the consideration of the conviction and sentence. During the hearing it was intimated that a second appeal had just been filed in the High Court.

In support of the Rule it is urged that the accused took what was their own property and in any case did not act dishonestly because they took the crop under a *bona fide* claim that it was their own property. The learned Government Advocate contends that the question of their intention is to be judged by the position on the 25th November. No doubt that is correct and a person may commit theft of his own property as indicated in illustrations (*j*) and (*k*) to s. 378. But in spite of the delivery of possession of the field which in

law put the landlord in possession of the standing crop also, I am of opinion that in the circumstances of this particular case Meghia and the petitioners were under the impression that the standing crop was Meghia's property, not only because she had grown it but also because the right to the field on which it stood was the subject of an appeal filed prior to the date of delivery of possession. Petitioners had in fact no idea of causing wrongful gain to Meghia or wrongful loss to the decree-holder. Section 379 is always of most doubtful applicability to this class of case in which the question of property is only in course of determination in a civil suit.

The Rule is made absolute and the convictions and sentences are set aside. The fines, if paid, will be refunded.

Z. K. *Rule made absolute.*

ALLAHABAD HIGH COURT.

CRIMINAL MISCELLANEOUS No. 212 OF 1926.

October 20, 1926.

Present:—Justice Sir Cecil Henry Walsh, KT., Acting Chief Justice.

Syed RAZA HUSSAIN—APPLICANT

versus

EMPEROR THROUGH FIDA ALI KHAN —OPPOSITE PARTY.

Cr. P. C. (Act V of 1898), s. 526—Transfer of case—Grounds for transfer.

Persons who engage in what may be called political or social controversies, or controversial matters in the local affairs of their own community, and what may be described generally as public affairs and who happen to be unable to do so without bringing themselves within, at any rate, an alleged breach of the criminal law, must take the local Courts as they find them. [p. 106, col. 2.]

The High Court will not encourage the public belief that the Judicial and Magistrate Benches can be dragged into the arena of political and personal strife by means of applications, the foundation of which is a deliberate attempt to involve members of the local Bench who have a public duty to perform, in local and personal controversies. [*ibid.*]

No Court ought to interfere with the course of judicial proceedings by an order for transfer unless it is satisfied by clear and unimpeachable evidence that the Court, or individual, from whom it is proposed to transfer the case, has by some personal conduct rendered himself unfit, or unlikely to give the accused a fair trial. Subject to that salutary provision local people must take the local Courts as they find. [*ibid.*]

Criminal miscellaneous application for transfer.

Mr. *Muhammad Husain*, for the Applicant.

The Government Advocate, for the Crown.

JUDGMENT.—This is one of those troublesome and difficult cases, which are dignified by the misleading description of an application for transfer. I am quite satisfied that no grounds for transfer exist, that the affidavit, which is put forward to support it, is a scandalous and irrelevant document, which must be removed from the file of the Court where it ought never to have been placed, and that I might confine myself to the simple duty of dismissing this application. It is true that there are two so-called complaints against the particular gentleman who is trying the charge under s. 110 against the applicant. One of them is that he refused to make an order disclosing to the accused the names of the witnesses for the prosecution. The circumstances under which he did so do not very clearly appear. My attention has not been drawn to any provision of the law which has been broken in this matter, and I decline to regard that as a serious allegation in any way affecting this application. The other allegation is that he has shown "extraordinary leniency" to the witnesses for the prosecution. What does this mean? It is one of those vague and general suggestions which generally mean nothing, except a desire to be offensive. What it means I do not know, except so far as Mr. Muhammad Husain for the applicant was able to give me an explanation. It appears that a gentleman of the advanced age of 55, in the month of June, in the course of his *duranee vile* in the witness-box, which included three days' cross-examination, was offered a chair by the Magistrate. Whether this was an act of leniency, or mis-placed courtesy, I do not stop to enquire. I have no hesitation in holding that it is not an adequate ground for a broad charge against the Magistrate of having treated the witnesses for the prosecution with extraordinary leniency and undue favour. The rest of the affidavit is of the most irrelevant character possible to conceive. It is difficult to summarise 65 paragraphs of this sort of stuff in a compendious statement, but, generally speaking, it consists of a series of roving

charges of misconduct, malicious and unfair persecution on the part, so far as I can gather, of the District Magistrate and his subordinate officers and of the Police in the District of Banda, where this applicant resides. It opens up past matters, it flings charges against persons who have nothing whatever to do with this particular case, and it is one of the most unjustifiable documents I have ever seen filed in a Court of Law. There is an old saying that "if you only throw enough mud some is certain to stick." Whether that was the object of the affidavit is no concern of mine. But there is a fundamental and unanswerable objection to the practice of filing such affidavits, and I would appeal to the profession in this High Court, if they have any regard for their own reputation for professional conduct to abstain from lending themselves to such outrageous proceedings. The objection to such a proceeding is fairly obvious and not difficult to state. If the Court is silent with regard to such matters, which are, of course, highly controversial, it is assumed because proceedings in a Court of Law are public and it is impossible to restrain or control the publication of matter, however offensive—it is assumed possibly only by ignorant and stupid people, who have no opportunity of investigating such matters possibly by persons who ought to know better, that there is something in it or such allegations would not be made. If, on the other hand, a Court endeavours to form an opinion upon such matters, it is doing so obviously on inadequate materials and may be led into serious error and unconsciously inflicting injustice or undeserved pain upon individuals. For example, a reference in an affidavit of this kind to previous cases, in which the trying officer in this case was not concerned, is clearly irrelevant. If it were relevant, it would be the duty of the Court to re-open and judicially deal with previous matters which have no concern with the matter the Court is called upon to decide. The attempt to investigate such matters upon affidavit evidence would involve a protracted and probably useless enquiry, and the Court necessarily feels itself embarrassed in dealing with the matter at all lest it should be thought that any opinion was expressed without adequate material. I decline to express any opinion about the matter, but I think it is due to the persons concerned to draw attention to what the Government Advocate pointed out to the Court, namely, that between the time when this charge was formally begun, and the current proceedings, about which complaint is made by the applicant, there has been a complete change in the personal of the officials who are charged broadcast with this alleged prejudiced and unfair conduct. So far as I am concerned with regard to the transfer application, I am only repeating what I have said over and over again that in my view persons, who engage in what may be called political or social controversies, or controversial matters in the local affairs of their own community, and what may be described generally as public affairs, and who happen to be unable to do so without bringing themselves within, at any rate, an alleged breach of the criminal law, must take the local Courts as they find them. There seems to be an impression abroad that you have only got to make yourself sufficiently objectionable to the local Magistrates, or the local authorities, so as to incur their displeasure, to render any judicial officer in that particular district unfit to try your case. It is often put in argument, and I believe it is sometimes to be found in decided cases, that it is sufficient to found an application for transfer that the applicant is apprehensive that he will not get a fair trial. That is not the law. There is not the slightest justification for such a conclusion, and there is ample authority throughout India establishing the contrary. There are instances of foolish orders, which can, no doubt, be found in the reports in which some support seems to be lent to that idle proposition. No Court ought to interfere by an order for transfer unless it is satisfied by clear and unimpeachable evidence that the Court, or individual, from whom it is proposed to transfer the case, has by some personal conduct rendered himself unfit, or unlikely to give the accused a fair trial. Subject to that salutary provision local people must take the local Courts as they find them. So far as the High Court is concerned it will not encourage the public belief that the Judicial and Magistrate Benches can be dragged into the arena of political and personal strife by means of applications, the foundation of which is a deliberate attempt to involve members of the local Bench who have a public duty to perform, in local and personal controversy.

In this country, it seems to me, although at one time there was a tendency to check the current of applications of this kind, that latterly that tendency has increased, and the idea has grown that you have only got to throw enough mud to be sure that some will stick, and by your own instrumentality to drag the Magistrate from his position as president of the tribunal into the arena of the actual dispute itself, by unjustifiable attempts to interfere with the performance of his duty and by aspersions cast upon him, in order to justify an allegation that he is unfit to try your case. If that were the law certainly it is not—the result would be that the worse the conduct of the accused, the more unjustifiable the attacks made upon the tribunal, the stronger his case would become for representing to the High Court that the tribunal was unfit to try the case. Carried to its logical conclusion that sort of conduct would render many of the Magisterial Courts unable to carry out their public duties.

I have made it quite clear that there is no ground, in my opinion, either in the affidavit, or in any reasonable suggestion which can be made, for the notion that Mr. Liakat Husain, Deputy Magistrate of the First Class, who is trying this case, is unfit to do so, or that he has committed himself in any way to any course of conduct which could be regarded as having the faintest shadow of justification for this application. The only legal ground would be that he has by his conduct either on the Bench, or elsewhere, shown that he is unfit to give the applicant a fair trial. There are two sides to every question, and it would be a monstrous injustice, and I should be unfit to occupy the position I hold, if I used a single expression which would justify any sane person in supposing that either in my mind, or justifiably in the mind of any reasonable person, there lingered the faintest suggestion that this gentleman was unfit to complete the trial in this case. I am satisfied that no more unfounded application for transfer was ever made than this. On the other hand in such cases it is difficult to retrace one's steps and undo the harm that has been done. You cannot recall the past. I am, therefore, going out of my way to take a course, with the consent of the applicant, which to my mind is more in the public interest than merely dismissing this application and allowing things to take their course. There are two proceedings, one under s. 110 of the Cr. P. C. (the *badmashi* section) and one under s. 504 of the Indian Penal Code for interfering with a witness or the due course of justice, and they stand upon a slightly different footing. The existence of the latter charge makes the course which I have finally decided to take somewhat more difficult, but nonetheless I am convinced that what I am going to do is in the best interest of every body. The charge under s. 110 was instituted by an order somewhere in March. The actual proceedings have been going on since June. A large number of witnesses have already been called and some 200, it is said, though possibly that figure is an exaggeration, may yet have to be called. It is obvious that such a proceeding must loom very large in the criminal proceedings in the Magistrate Courts, and hold up a great deal of other useful work. The object of the section is, as everybody knows, to use a colloquialism, to keep the man quiet. In this particular case the applicant, who is the respondent to that proceeding, rightly or wrongly, is so completely out of touch with the authorities, and is nursing, again whether rightly or wrongly is not the question, such a sense of personal grievance that he has sworn, and repeats through his Counsel before me, that his honour and liberty are bound to be lost if he stays in the District of Banda. It, therefore, would appear in the interest of everybody concerned that he should not stay in the district. Probably nobody would be more satisfied than the authorities who have, as they consider, been compelled to take this proceeding, and I, therefore, in the public interest, without expressing any opinion one way or the other, except the very clear and positive opinion that no legal ground exists for this application, accept the undertaking of the applicant, through Mr. Muhammad Husain, that he will remain outside the District of Banda for the next three years. On that understanding I grant a stay of the proceeding under s. 110 of the Cr. P. C. Three years is a long time. Mr. Muhammad Husain suggested that a shorter time would meet the case. It may be that it will. I hope it will. When bitter feeling exists between either parties or individuals, one of the best cures is abstention from one another. It may be if there are faults on one side, or the other, that in less time than three years

more reasonable counsels will prevail and the gentleman in question will be regarded as to be trusted to return to the district with the full agreement of the authorities, with whom for the present he seems to be on such bad terms. So I will reserve both to him on the one hand and the District Magistrate on the other liberty to apply to me, or any Single Judge if I am not sitting in the High Court, to abbreviate the term of this order. On the other hand if the applicant without the consent of a Judge of the High Court, or of the District Magistrate, returns to any place within the District of Banda within the period, he will commit a breach of this personal undertaking given by him through his Counsel, which is intended by me to have the force of an injunction, and will render himself liable to the penalties usually consequent upon personal disobedience to an order. In other words he will be guilty of contempt of Court, and on the matter being brought before the High Court, he will be liable to be dealt with as such, and further it will be open under this order for either the Sub-Divisional Officer, or the District Magistrate, to apply to this Court for liberty to continue the proceedings which I propose to stay. On the above terms I stay the proceedings against the applicant under s. 110 until further order.

I now come to the more troublesome question under s. 504 of the Indian Penal Code. I recognise the force of the Government Advocate's submission on that point. It is a more serious matter to stay such proceedings under what may be regarded as to a large extent a consent order, than it is to stay proceedings under s. 110, where the person charged is willing to remove himself from the district. Interference with witnesses and the course of justice during proceedings is, of course, always reprehensible and unjustifiable and may be very serious. The District Magistrate obviously took that view in directing proceedings, although the person offended preferred not to become the complainant himself. But on the whole having regard to the difficulty of allowing that proceeding to subsist, after accepting an undertaking from the applicant to remain out of the district for three years, I have come to the conclusion, which I hope is equally in the public interest, that even that may be allowed to remain dormant for the present. I, therefore, direct that, provided the applicant before me commits no breach of the undertaking which has been given in the other proceeding, which I have just dealt with, and provided that a Judge of the High Court sees no reason why, on the application of the District Magistrate, that proceeding should be revived on any subsequent date in spite of the applicant having complied with his undertaking, I grant a stay of that proceeding also until further order by this Court. If the undertaking is fully carried out the proceedings will come to an end at the end of three years.

In case the question should arise hereafter, I desire to make it plain that the intention of this order is that if the three years' undertaking is carried out on the part of the applicant, and no necessity arises for any application to this Court, or any further order in the matter, both proceedings under s. 110 and 504 should then be withdrawn by the District Magistrate and terminated, without prejudice, of course, to any other proceeding which another District Magistrate may think it right to bring with regard to other matters.

This order is to take effect from the 14th of November, from which date the three years will begin to run. If after that date during the current year any emergency should arise requiring the presence of the applicant in the district and he is able to obtain the consent of the District Magistrate and the Government Advocate, I will, on application to me, grant that concession.

Z. K. *Order accordingly.*

OUDH CHIEF COURT.

CRIMINAL REFERENCE No. 61 OF 1926.

November 17, 1926.

Present:—Sir Louis Stuart, KT., Chief Judge.

BHAWANI BHIK AND ANOTER—ACCUSED—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Cr. P. C. (Act V of 1898), ss. 260, 364—Summary trial—Magistrate, whether bound to record notes of evidence or statement of accused persons.

There is nothing in the Cr. P. C. which requires a Magistrate in a summary case to place upon the record the notes of the evidence or a full statement of the examination of the accused persons.

Case reported by the First Additional Sessions Judge, Bara Banki, dated the 15th November, 1926.

JUDGMENT.—The reference of the learned Additional Sessions Judge of Bara Banki raises a question of some importance. Pandit Suraj Nath Sapru, a Magistrate exercising First Class powers in the Bara Banki District and duly authorised under s. 260 of the Cr. P. C. to try cases summarily, heard a case summarily, in which two persons were charged with theft under s. 379 of the Indian Penal Code, convicted them and sentenced them to non-appealable sentences. The learned Sessions Judge has taken exception to the fact that the learned Magistrate did not place upon the record a note of the evidence of the prosecution witnesses or of the defence witnesses. He further took exception to the fact that the learned Magistrate did not record the examination of the accused upon the record in the form under s. 364 of the Cr. P. C. Upon these grounds he has referred the matter to the Chief Court with the suggestion that the proceedings should be set aside and the case re-tried. The learned Magistrate has submitted an explanation, which I accept as absolutely accurate, to the effect that, although he did not place upon the record any note of the evidence, he made notes of the evidence for his own use which he destroyed after the case was disposed of, and further that he examined the accused persons according to the provisions of s. 364 though he did not record more than a brief note of the examination on the record. There is nothing in the Cr. P. C. which requires a Magistrate in a summary case to place upon the record the notes of the evidence or a full statement of the examination of the accused persons. The learned Magistrate has committed no irregularity and he has not departed from the proper procedure. The whole object of entrusting qualified Magistrates to try certain cases summarily will be defeated if Courts in revision lay down rules of procedure for the hearing of summary cases which would in effect provide a procedure similar to the procedure required in cases which are not tried summarily. I see no reason, on examining the judgment of the learned Magistrate, to suppose that he has tried the case otherwise than carefully and correctly. I find no reason of any kind for interfering in revision. I accordingly reject this application and return the papers.

G. H. *Application rejected.*

PATNA HIGH COURT.

CRIMINAL REVISION NO. 246 OF 1926.

June 30, 1926.

Present:—Mr. Justice Adami.

ARJUN KURMI AND OTHERS—ACCUSED—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Cr. P. C. (Act V of 1898), ss. 154, 360—Information given to Police before commission of offence, whether First Information Report—Criminal trial—Evidence, recording of—Statement, how to be read out—Procedure—Objection, when should be taken.

Section 360 of the Cr. P. C. does not require that an endorsement or certificate should be made or given that the statement of a witness has been read over to him, so that where such endorsement is made but is defective it is impossible to hold merely on the basis of the endorsement that the depositions were not read over to the witness in the presence of the accused. [p. 111, col. 2.]

Where an objection is taken on the ground that the provisions of s. 360 of the Cr. P. C., have not been observed, it should be taken immediately after there has been a neglect to comply with the provisions of the law. [*ibid.*]

Section 360 of the Cr. P. C. does not lay down that the deposition of a witness should be read over to him within the hearing of the accused. If the accused or his Pleader is doubtful as to the manner in which the statement of a witness has been recorded or as to any point in the deposition, he would have a right to ask that the deposition should be read over to him so that he can satisfy himself as to what has been actually recorded, but that demand should be made at once. [p. 111, col. 2; p. 112, col. 1.]

A statement made by a person to the Police that he has seen a mob of men armed with weapons going towards a certain place cannot be treated as the First Information Report with regard to any offence that any members of the mob may subsequently commit, inasmuch as no offence had been committed at the time when the person who made the statement to the Police saw the mob. [p. 112, col. 1.]

Criminal revision against an order of the Sessions Judge, Patna, dated the 29th of March, 1926, modifying that of the Magistrate, First Class, Barh, dated the 28th of October, 1925.

Sir *Ali Imam* and Mr. *B. C. Sinha*, for the Petitioners.

The Government Advocate, for the Opposite Party.

JUDGMENT. — The petitioners, Ajodhya Kurmi, Chaha, Arjun Kurmi, Kirat Kurmi, Shibu Lal, Shamnarain Lal, and Shamlal Mahto have been convicted

under s. 148 and sentenced to six months' rigorous imprisonment each; the rest of the petitioners have been sentenced to three months' rigorous imprisonment under s. 147, Indian Penal Code. Ajodhya and Shamlal Mahto have each been sentenced to six months' rigorous imprisonment under s. 326 and Chaha has been sentenced to four months' rigorous imprisonment under s. 324, Indian Penal Code.

It appears that there are two adjoining villages, Sagarpur, inhabited by *Gwalas*, and Sirsi chiefly inhabited by Kurmis. In Sirsi, near the pathway running from Sagarpur, there is a tank called the Sadhava Khata. According to the case brought out by the prosecution evidence, on Monday the 6th April, 1925, at about 10 A.M. Manu, Bhatu and others of village Sagarpur took their buffaloes to drink water at the Sadhava Khata. The buffaloes fouled the water and cowherds of Sirsi abused the Sagarpur men for this reason. There was an interchange of abuse and then Manu and his companions took back the cattle to Sagarpur. At about 11 o'clock a mob of 60 or 70 men came from Sirsi to Sagarpur to attack the Sagarpur men. The Sagarpur men opposed them and there was a fight between the two parties just south of the Sagarpur village. Manu was struck with a *lathi* and Ajodhya Mahto cut off his thumb with a sword, while Chaha struck Manu with a sword on the left side of the chest. After the fight, the Sirsi men drove away the buffaloes of Sagarpur and impounded them. The *chaukidar*, Bihari Dusadh, went to the Bakhitiarpur Police Station, which is eight miles away from Sagarpur, and informed the head constable there that while he was reaping his crop, he saw a mob of about 100 men armed with *lathis*, *garasas* and swords going from Sirsi towards Sagarpur. He had made an inquiry and heard that many Sagarpur buffaloes had grazed the crops in Sirsi and that, therefore, the Sirsi men were going to Sagarpur to seize the cattle. The head constable went to Sagarpur and found Manu wounded, he took Manu's statement, and Manu's story was that, while the Sagarpur buffaloes were drinking at the Sadhawa Khata some of them strayed into the crops, and some of the Sisri men had come up and tried to seize the buffaloes but the Sagarpur *Gwalas* managed to get their buffaloes home. Sometime after that the petitioners and others had come in an armed mob to Sagarpur. This statement of Manu was treated as a First Information, and it is to be noticed that the story of what had happened in the morning at the Sadhawa Khata differed from the story as to the cause of the attack by the Sirsi men given in the prosecution evidence. The writer head constable found blood and the cut off thumb of Manu on the spot pointed out by the Sagarpur men as the scene of the fight.

The defence story was that on the 5th of April, the Sagarpur cattle had grazed the fields of the Sirsi men and the Sirsi men had impounded them. The Sagarpur men were angry at this and came in a body on the 6th April with a large number of cattle and proceeded to graze the Sirsi lands. When the Sirsi men tried to take the cattle, in order to impound them, there was a fight and the Sagarpur people succeeded in rescuing their cattle. None of the Sirsi men were wounded. To back the story, the pound-keeper was called but the Courts below have found that his evidence was false and that the receipts were got up. As a matter of fact the Sirsi men had impounded the Sagarpur buffaloes on Monday the 6th and in the evening the Sagarpur people released them.

After considering the evidence, the learned Sessions Judge has come to the finding that the prosecution evidence with regard to the cause of the fight, namely, the fouling of the water earlier in the morning, was not the true cause, and he believed that the information given by Manu that the Sagarpur buffaloes strayed from the tank and ate the crops of the Sirsi men was the real cause of the trouble.

With regard to the actual occurrence he found that the Sirsi men did come in a body to Sagarpur and attacked the Sagarpur men at the place pointed out by the prosecution witnesses. He held that the Sirsi men made an attempt to seize the Sagarpur cattle at Sagarpur in order to impound them; he disbelieved the story of the defence that the occurrence took place at Sirsi.

The learned Sessions Judge held that, though the prosecution case differed in the matter of the cause of action or occasion of the fight from the First Information, he would not be justified in rejecting the whole case on that account. It was found by both the Courts that each one of the

petitioners took part in the fight and that they have been rightly convicted.

Sir Ali Imam on behalf of the petitioners contends that the trial is vitiated by the fact that the provisions of s. 360 of the Cr. P. C. have not been followed in the case of four of the witnesses. He points to the endorsement at the end of the depositions of each one of these witnesses. At the end of the deposition of prosecution witness No. 1 the endorsement is "Read over and found correct" and it is signed by the witness who is an Assistant Surgeon. His cross-examination bears no endorsement except the signature of the witness. Prosecution witness No. 11 is a Sub-Deputy Magistrate who was examined in English. At the end of his deposition the endorsement in his own writing is "Read and admit it to be correct" signed by the witness. There is also an endorsement by the *peshkar* "Read out by the witness and admitted by him to be correct." After that there is the further cross-examination with the endorsement in the witness's handwriting "Read and I admit it to be correct" signed by the witness. At the end of the examination-in-chief of the prosecution witness No. 12 there was an endorsement in his handwriting "Read and found correct" signed by the witness; there was also the endorsement by the *peshkar* "Read out by the witness and admitted by him to be correct." At the end of his cross-examination there is the endorsement by the *peshkar* "Read out by the witness and explained in Hindi and admitted to be correct." Similarly in the case of prosecution witness No. 13, a Sub-Inspector of Police, there is the endorsement "Read and admitted to be correct" in his writing and signed by him, and also the endorsement "Read out by the witness and admittted by him to be correct." At the end of his cross-examination there is a similar endorsement by him and by the *peshkar*.

Sir Ali Imam contends that these endorsements show that the direction given in s. 360 that the deposition should be read over to the witness has not been observed and s. 360 being a mandatory section, the trial will be vitiated since the evidence of these witnesses will be inadmissible.

Now, this contention has not been raised in either of the Courts below and no objection was made in the trial Court. There is nothing before this Court to show that the provisions of s. 360 were not in fact carried out. The Code does not require that an endorsement or certificate should be given, and it is impossible to say whether, though the endorsements take the form they do, the depositions were not read over to the witnesses in the presence of the accused. It is not contended that the reading of the depositions was not in the presence of the accused, but the rulings of the Calcutta High Court have been relied on and it is urged that the depositions were not read out or over within the hearing of the accused. While the petition, which is supported by an affidavit, states that the depositions were not read out, the learned Magistrate in his explanation states that "the evidence of all the witnesses was duly recorded and the provisions of s. 360, Cr. P. C., were fully complied with. The depositions were read over in the presence of the accused and their lawyers and were duly interpreted to the witnesses in the Hindi language; no objection was taken at the time by any accused as to his not being able to follow or understand the evidence of any witness." As against the affidavit I have the statement of the Magistrate and there is no reason to disbelieve the latter. If an objection is taken on the ground that the provisions of s. 360 have not been observed that objection should be taken at once after there has been a neglect of the provisions of the law. It is useless to come up in revision and put forward this point for the first time, for the Court has nothing to go upon. Section 360 does not lay down that the deposition should be read over to the witness within the hearing of the accused and in fact sub-s. (3) to s. 360 would seem to point to the fact that the purpose of the section was to enable the witness to safeguard himself, for that sub-section makes no mention about a case where the accused does not understand the language in which the deposition is taken down. Had it been the object of the Legislature to ensure that the accused should understand and hear the evidence as it is read out, they would surely have made provision in sub-s. (3) for the interpretation of the evidence, so that the accused might understand it. There is no doubt, that, if the accused or his Pleader is doubtful as to the manner in which statements of a witness have

been recorded or as to any point in the deposition, they would have a right to ask that the deposition should be read over to them, so that they can satisfy themselves as to what has been actually recorded, but that demand should be made at once. Considering that this contention has not been raised until this stage, I am of opinion that it cannot be made a ground for interference in revision.

With regard to the merits, Sir Ali Imam urges that, as the prosecution case has not been believed with regard to the occasion and cause of the fight, the Courts were not justified in basing their conviction on the evidence as to what happened afterwards. The Courts have found as a fact that the fight occurred at the time and at the place deposed to by the prosecution witnesses. The difference in the story with regard to the cause and the occasion of the fight is not really very great, the only difference being whether the quarrel was about the fouling of the water or about the straying of the cattle from the water to the fields of the Sirsi men. The prosecution witnesses were evidently eager to show that there was no blame on their side. The actual occurrence has been fully proved by the evidence given by the prosecution and on that evidence I am satisfied that the Courts below were justified in finding that the petitioners committed an offence.

The last point taken is that the statement made by Manu was not the First Information and was inadmissible in evidence, seeing that previously the *chaukidar* Bihari Dusadh, had given information at the *Thana*. In my opinion, the information given by Bihari Dusadh at the *Thana* cannot be taken to be a First Information. He merely stated that he saw a mob of men armed with *lathis*, *garasas* and swords going from Sirsi towards Sagarpur; he did not give any information of an offence having been committed. The reason for their going he learnt by hearsay, and, so far as he knew, when he gave information no crime had yet been committed. The head constable to whom he made the statement was not empowered to investigate the offence, if committed, and, in my opinion, the Courts below were justified in treating the statement of Manu as the First Information. In any case, even if Manu's statement were omitted and treated as inadmissible there would be very little difference, for the prosecution case was satisfactorily proved by the prosecution witnesses.

It is urged that Shiblal and Sham Narayan are Kayesths and would not join in the riot; but the Courts below have found as a fact that these two men were present, and that is sufficient.

I can see no reason to interfere, and reject the application.

The petitioners will surrender to their bail to serve out the remainder of their sentences.

Z. K. *Application rejected.*

PATNA HIGH COURT.

CRIMINAL REVISION No. 355 OF 1926.

June 15, 1926.

Present:—Justice Sir Jwala Prasad, KT., and Mr. Justice Macpherson.

ANWAR ALI—ACCUSED—PETITIONER

versus

THE CHAIRMAN, DEOGHAR MUNICIPALITY—OPPONITE PARTY.

Sonthal Pargannas Justice Regulation (V of 1893), s. 4 (1) (ii) (b)—Cr. P. C. (Act V of 1898), s. 439—Sonthal Pargannas—Acquittal by Magistrate—Revision—Commissioner, whether can set aside acquittal—High Court, interference by.

By virtue of the provisions of s. 4 (1) (*ii*) (*b*) of the Sonthal Pargannas Justice Regulation, the Commissioner of the Bhagalpur Division can exercise the powers of a High Court under s. 439 of the Cr. P. C., and can set aside an order of acquittal passed by a Magistrate. In such a case the jurisdiction of the Patna High Court is excluded and it cannot revise any order passed by the Commissioner. [p. 115 col. 1.]

Criminal revision from an order of the Commissioner of the Bhagalpur Division, dated the 23rd April, 1926.

Mr. *M. Yunus*, for the Petitioner.

The Government Advocate, for the Opposite Party.

JUDGMENT.

Jwala Prasad, J.—The petitioner, Anwar Ali, was prosecuted by the Chairman of the Deoghar Municipality under ss. 186 (1) and 192 of the Bihar and Orissa Municipal Act of 1922. He was tried by a Magistrate of the Second Class of Deoghar, who by his judgment dated the 19th February, 1926, acquitted the petitioner.

The Chairman of the Municipality moved the Commissioner of the Bhagalpur Division against the order of acquittal and the Commissioner by his order, dated the 23rd

April, 1926, set aside the acquittal and directed re-trial of the petitioner.

Aggrieved by this order of the Commissioner the petitioner moved this Court under s. 439 of the Cr. P. C. and obtained a Rule by this Court on the 27th May, 1926, which runs as follows: "This application will be heard by the Criminal Bench. Issue the usual notices. Let further proceedings be stayed pending the disposal of this application." Accordingly a letter of this Court Memo. No. 1477 Cr. A., dated the 27th May, 1926, forwarding a copy, was addressed by the Assistant Registrar to the Commissioner of Bhagalpur enclosing copy of letter No. 1477 Cr. A. of the same date to the Deputy Commissioner of the Sonthal Parganas, calling upon the latter to submit the original record and to stay further proceedings and requesting the Commissioner to forward the original record and proceedings in his own Court. In reply to this letter the Commissioner in his letter No. 98 J/V, dated the 1st June, 1926, pointed out that he had dealt with the case under s. 439 of the Cr. P. C. in the exercise of his power as the High Court of the Sonthal Parganas under s. 4 I (*ii*) (*b*) of the Sonthal Parganas Justice Regulation, V of 1893, and consequently the requisitions issued by the High Court were issued by inadvertance. He also intimated that pending further orders of the Court, the record of the case has been withheld and the Deputy Commissioner has been asked not to take any action upon the order of this Court dated the 27th May, 1926.

Considering the importance of the question raised by the Commissioner of Bhagalpur, the Government Advocate was asked to appear. The case was argued at great length on both sides. The complainant, Chairman of Deoghar Municipality, has also appeared in this case through Mr. Yunus.

The first question is whether this Court had any power to pass the order of the 27th May, 1926. In the application of the petitioner on the basis of which the aforesaid order was passed the petitioner prayed that the order of the Commissioner setting aside his acquittal and directing his re-trial be set aside. It was also prayed that the proceedings *re* the trial of the petitioner started upon the basis of the order of the Commissioner be set aside. The Commissioner says that he passed the order in question as the High Court of the Sonthal Parganas under s. 4 I (*ii*) (*b*) of the Sonthal Parganas Justice Regulation, V of 1893. Section 4 of that Regulation says that the Cr. P. C. of 1898 shall have effect in the Sonthal Parganas, subject to the modifications indicated in that section. The most important modification is the constitution of the Commissioner of Bhagalpur as the High Court for certain criminal cases in the Sonthal Parganas within the meaning of the term as defined in s. 4 cl. (*iv*) of the Cr. P. C. The "High Court" in this section leaving out the words with which we are not concerned, means the highest Court of criminal appeal or revision for any local area; or, where no such Court is established under any law for the time being in force, such officer as the Governor-General in Council may appoint in this behalf. The High Court within the Province of Bihar and Orissa known as the Patna High Court established in 1916 under the Letters Patent of that year is the highest Court of Appeal in the civil and criminal matters and exercises revisional jurisdiction under s. 439 of the Cr. P. C. The jurisdiction of this Court is modified by the Sonthal Parganas Justice Regulation V of 1893 referred to by virtue of the definition of High Court with respect to the area called the Sonthal Parganas given in that section. Clause I of that section defines the "High Court" (*i*) in reference to proceedings against European British subjects, or persons jointly charged with European British subjects, the High Court of Judicature at Fort William in Bengal (now in the Province of Bihar and Orissa the High Court of Patna): and (*ii*) in reference to proceedings against other persons, (*a*) in cases tried by the Court of Session and in appeals under s. 417 from original or appellate orders of acquittal, the High Court of Judicature at Fort William in Bengal; and (*b*) in other cases, the Commissioner. Sub-cl. (*i*) of cl. I applies only to cases against European British subjects and we are not concerned with that case. We are concerned with sub-cl. (*ii*) of cl. I. In cases coming under that sub-clause the High Court of Patna has jurisdiction in the area called the Sonthal Parganas. In cases not coming under that clause, in other words, in other kinds of cases, the High Court of Sonthal Parganas is the Commissioner of Bhagalpur.

The question then is whether the present case comes under cl. (*a*) or cl. (*b*) of sub-cl. (*ii*). The present is a case of an accused person tried by the Sub-Deputy Magistrate

of Deoghar for offences under the Bihar and Orissa Municipal Act which is in force in the Sonthal Parganas. The accused (petitioner) was acquitted by the Sub Deputy Magistrate. The order of acquittal was appealable and was also revisable by the High Court under s. 439 of the Cr. P. C. An appeal against an acquittal is allowed only to the Local Government and it lies only to a High Court. Any private person just like the complainant might invoke the revisional powers of the High Court to set aside an order of acquittal under s. 439 or the High Court may of its own motion set aside such an order. There was no appeal in the present case by the Local Government under s. 417. If there was an appeal it would have lain only to the High Court of Patna under cl. I (*ii*) (*a*) of s. 4. The Chairman of the Deoghar Municipality who was the complainant in the case applied to the Commissioner of Bhagalpur to set aside the order of acquittal in his capacity as the High Court of the Sonthal Parganas.

The learned Government Advocate contends that the matter dealt with by the Commissioner under s. 439 came under cl. 1 (*ii*) (*b*) of s. 4. His contention is that the High Court of Patna has only jurisdiction to deal with appeals under s. 417 against an order of acquittal and that it has no power to deal with such an order under s. 439 of the Cr. P. C. and that the Commissioner of Bhagalpur is the High Court in such matters. Mr. Yunus on behalf of the petitioner resists this contention of the learned Government Advocate and says that all matters connected with an order of acquittal, be it an appeal from that order or an application in revision, is excluded from the jurisdiction of the Commissioner of Bhagalpur and that the High Court of Judicature at Patna is the only authority competent to deal with such matters. He says that although the words used in cl I (*ii*) of s. 4 refer especially to appeals under s. 417, it includes also applications in revision under s. 439 of the Cr. P. C. In support of his contention he relies upon s. 439 of the Code which says that the High Court dealing with matters in revision under that section may exercise any of the powers conferred on a Court of Appeal by ss. 423, 426, 427 and 428 or on a Court by s. 338; and he says that an order of acquittal can only be set aside by the High Court acting under s. 439 in the manner prescribed by s. 423 of the Cr. P. C. which deals with appeals. Reference has also been made to the provision in s. 423 (I) which says that in dealing with an appeal under s. 417 from an order of acquittal the Court may reverse such order or direct that a further enquiry may be made, or that the accused may be re-tried or committed for trial as the case may be and find him guilty and pass sentence according to law. The contention is that reading ss. 423 and 439 together the order of acquittal can only be set aside by the High Court exercising its revisional powers under s. 439 by a reference to the provisions in s. 417 relating to an appeal from an acquittal. Therefore, the power given to the High Court at Patna to deal with appeals under s. 417 against an order of acquittal implies that the power of revising such an order under s. 439 is also vested in the said High Court and is taken away from the Commissioner of Bhagalpur. The contention does not seem to be sound. The powers of revision are different from powers exercisable in appeal The right of appeal can only be conferred by express provision in the Cr. P. C. whereas the power of revision conferred under s. 439 is larger in scope and it deals with matters in which there may or may not be an appeal. It gives a wide power to the High Court to look into the record of any case and satisfy itself as to the correctness and propriety of the finding or sentence recorded or order passed and as to the irregularity of proceedings of an inferior Court. This power of revision is exercisable at the instance of a party or by the High Court of its own motion. Even in cases where there is an appeal the power of revision may be exercised where no appeal has actually been brought [*vide* cl. (5) of s. 439]. Under that clause a private party has a right to apply to the High Court to set aside an order of acquittal although it has no right of appeal. Section 439 only indicates the manner in which certain cases coming to this Court might be disposed of. It refers to the powers of the Appellate Court defined in s. 423 as indicating the mode in which appealable orders may be dealt with by the High Court. It does not mean that an application in revision is converted into an appeal simply because under s. 439 a High Court is empowered to exercise the powers defined under s. 423 with respect to appeals. It is obvious that an application by a

private party against an order of acquittal under s. 439 cannot be regarded as an appeal under s. 417 for a private party has no right of appeal under that section. Reference to s. 417 in s. 423 and to s. 423 in s. 439 simply means that under the revisional powers of the High Court an order of acquittal may also be reversed and further enquiry or re-trial of the accused be directed as is indicated under cl. (1) (*a*) s. 423. The application of the Chairman of the Municipality in the present case cannot be treated as an appeal under s. 417 by the Local Government, and hence it cannot come under cl. I (*ii*) (*a*) of s. 4 which applies only to appeals under s. 417 from orders of acquittal. We have to read into that clause the words "and applications under s. 439 or words to that effect in order to amplify the scope of the provision and thus to give jurisdiction to the High Court at Patna to deal with applications in revision against orders of acquittal. This we are not permitted to do. It may seem to be an anomaly that an appeal from an order of acquittal under s. 417 should lie to the High Court at Patna, whereas an application in revision against the same order under s. 439 would lie to the Commissioner under s. 4 I of the Sonthal Parganas Justice Regulation, V of 1893. It may be that this is a case of omission; but that is a matter which has to be dealt with by competent authority.

The application to this Court against the order of the Commissioner of Bhagalpur passed under s. 439 of the Cr. P. C., setting aside the order of acquittal in the present case did not lie to this Court and it is obvious that it was entertained under a misapprehension. The order of the Commissioner exercising his powers as the High Court of the Sonthal Parganas under s. 4 cannot be dealt with by this Court, and, therefore, the petitioner had no right to come to this Court against the order of the Commissioner.

The result is that the Rule issued on the 27th May, 1926, calling for the record of the case and staying further proceedings is discharged.

Macpherson, J.—I also entertain no doubt that this application must be rejected.

It has been made under s. 439 of the Cr. P. C. on behalf of a person other than a European British subject and other than a person jointly charged with a European British subject, with the prayers that this Court will (1) set aside an order of the Commissioner of Bhagalpur purporting to act as High Court of the Sonthal Parganas in which he set aside the acquittal of the petitioner in the Court of the Sub-Deputy Magistrate of Deoghar and directed his re-trial, and (2) quash the proceedings now pending against the petitioner in that Court.

The first prayer fails because this High Court has, as Mr. Yunus admits, no jurisdiction under s. 439 or otherwise to set aside the order of the Commissioner. In point of fact the Rule was granted to consider the second prayer.

The second prayer fails because this Court possesses no jurisdiction under s. 439 over the proceedings against the petitioner in the Court of a Magistrate of the Sonthal Parganas. Furthermore, the order for re-trial of the petitioner was in fact within the jurisdiction of the Commissioner.

Under Ch. II of the Sonthal Parganas Civil Justice Regulation V of 1893 the jurisdiction of this Court under the Cr. P. C. with reference to proceedings against the petitioner does not extend beyond cases tried by the Court of Session, and appeals under s. 417 from original and appellate orders of acquittal [s. 4 I (*ii*) (*a*)], the Commissioner being the High Court with reference to all other proceedings against him. The proceedings now pending against him are manifestly not included within such cases or appeals. In fact Mr. Yunus for the petitioner admits that he is out of Court at once if s. 4 I (*ii*) (*a*) be strictly construed. His position is that a wide interpretation should be accorded to "appeals under s. 417" so as to make the expression cover also applications under s. 439 to set aside orders of acquittal. His ground is that anomalies may result if an appeal under s. 417 is made to one High Court and an application to set aside the same acquittal is made under s. 439 to the other High Court. The discussion before us has, however, clearly demonstrated that the possibility of divergent orders on the subject of an acquittal being passed by the two High Courts is so remote as to be in practice entirely negligible. It is certainly not such as would lead one to construe "appeals under s. 417" (which are presumably excluded from the jurisdiction of the Commissioner as High Court because they are preferred by the Executive Government and

the Commissioner is, except for his special judicial functions in the Sonthal Parganas, an executive officer) as including applications under s. 439 in respect of acquittals which can only be preferred by the private prosecutor and with which the Executive Government is not concerned.

Mr. Yunus next argues, if I understand him aright, that as this Court is the only Court that can set aside an acquittal by a Court in the Sonthal Parganas, the Court of the Sub-Deputy Magistrate is an inferior Criminal Court situated within the local limits of the jurisdiction of this Court, at least so far as acquittals are concerned, and accordingly this Court is empowered to revise the proceedings of such Magistrate in a case such as the present where he is about to try the petitioner whom he has already acquitted.

But there is no reason to hold that this is the only High Court that can set aside an acquittal by the Magistrate in the Sonthal Parganas. No doubt, this Court alone can set aside an acquittal on appeal. The learned Commissioner in his judgment does indeed describe the proceeding before him as an appeal against an acquittal, and he has also set out that the private prosecutor "has a right of appeal under s. 439." But that proceeding was in fact not an appeal, still less an appeal by the Local Government under s. 417, and the intention manifestly was to hold that it was open to him as the High Court to revise an order of acquittal. In fact his order concludes: "I accordingly direct that re-trial shall take place (under s. 439, Cr. P. C)." That an acquittal may be set aside by the High Court under s. 439 at the instance of a private prosecutor is settled law. It had also been so held in several High Courts prior to the date when the Regulation of 1893 was made, and the authority which made the Regulation is to be presumed to have been aware of that fact and to have intended that as High Court for the Sonthal Parganas the Commissioner of Bhagalpur should possess the ordinary power under s. 439 to revise orders of acquittal in such circumstances. Mr. Yunus then points out that the powers exercisable under s. 439 are "the powers conferred on a Court of Appeal under s. 423" and that the only powers conferred under s. 423 to set aside an acquittal on appeal, relate to appeals under s. 417 which are removed from the jurisdiction of the Commissioner, and contends that in the face of these provisions the presumption should not be made. But the argument involves the importation of words into s. 439 so as to make the provision quoted run "the powers conferred on (it as) a Court of Appeal under s. 423." The indications are that in s. 4 I (*ii*) (*a*) of Regulation V of 1893 the enacting authority specifically set out all the powers which it intended should not rest with the Commissioner as High Court in proceedings against persons of the status of the petitioner, and I can see no justification for importing any words into s. 439 which would restrict his jurisdiction by implication. Accordingly this Court is not the only High Court which has jurisdiction to set aside an acquittal by a Magistrate of the Sonthal Parganas.

Jurisdiction in respect of setting aside acquittals is in fact distributed between the two High Courts; this Court possessing it on appeal by Government and the Commissioner on application by a private party in revision. In s. 435 to s. 439, as in other provisions of the Code, 'High Court' means the Commissioner except where s. 4 I (*ii*) (*a*) of the Regulation operates. It has no operation in the proceeding pending against the petitioner in the Court of the Sub-Deputy Magistrate of Deoghar which for this purpose at least is not an inferior Court to this Court. Accordingly this Court has no jurisdiction to quash that proceeding. The same would have been the case if the Magistrate had without the intervention of the Commissioner started *suo motu* and illegally to re-try the petitioner; the petitioner's remedy would have lain in an application for revision in the Court of the Commissioner.

Mr. Yunus, it may be remarked, adopted in so many words the argument of Mr. Hill in *In the matter of Wilson* (1) which is summarised at the top of page 249 of I. L. R. 18 Calcutta in support of his claim that this Court has jurisdiction over all the Criminal Courts of the Sonthal Parganas under its revisional powers under the Cr. P. C., but a perusal of the Acts, Regulations and cases there cited has failed to satisfy me that the claim is well-founded.

Z. K. *Rule discharged.*

(1) 18 C. 247 at p. 249.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 318 OF 1926.

July 8, 1926.

Present:—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice Jai Lal.

DHANI—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 114, 302—Abetment of murder, what constitutes.

An accused person who was sitting near the scene of a quarrel urged his co-accused to kill their opponent telling them that if the latter survived he would get them into trouble, and the victim was murdered:

Held, that the accused's conduct amounted to abetment of murder and that he could rightly be convicted under ss. 302 and 114, Indian Penal Code. [p. 118, col. 1.]

Appeal from an order of the Sessions Judge, Karnal, dated the 26th February, 1926.

Mr. *Carden Noad*, Government Advocate, for the Respondent.

JUDGMENT.—On the evening of the 5th July, 1925, at about 10 P. M., one Mai Dhan, a *Jhiwar* of the village Bidhal in the Rohtak District, was subjected to an assault in a field near the village. The medical evidence shows that the unfortunate man was mercilessly beaten with sticks, that the bones of both his forearms and his two ribs were broken, and that he succumbed to the injuries shortly afterwards. Four persons, namely, Gordhan, Dhani, Chandgi and Chandu, have been convicted of the murder of Mai Dhan, and a fifth person, *Musammat* Sukh Devi by name, has been found guilty of instigating the murder; and they have been sentenced, Gordhan to death, and the remaining convicts to transportation for life each.

It is common ground that the prisoner Gordhan and the deceased Mai Dhan were not on good terms with each other, and that both were men of bad character and used to charge each other with having committed thefts and other cognate offences. Indeed, Gordhan was called upon to furnish security under s. 110, Cr. P. C., and was confined to the judicial lock-up for failure to furnish the required security. On the 4th July he was released, but was directed not to leave his village Now, the Head Constable Chandgi Ram deposes that on the evening of the 5th July he visited the village Bidhal in order to check the bad characters, and that when he enquired about the whereabouts of one Bhartu, the husband of *Musammat* Sukh Devi, Gordhan stated that Bhartu had gone to some other village. Mai Dhan, however, contradicted him and said that Bhartu was in the village. This altercation led to a quarrel between Mai Dhan on the one side and Gordhan on the other.

The story for the prosecution may be shortly stated. On the evening of the 5th July, at about 9 P. M., Gordhan came to call Mai Dhan, but the latter declined to accompany him. Gordhan, however, urged that he had to talk to him about an urgent business, with the result that Mai Dhan ultimately went away with Gordhan. After about an hour, the village *chaukidar* was informed that Mai Dhan was lying dead in a field near the houses of sweepers, and that he had been killed by the four male prisoners who had been instigated to commit the murder by *Musammat* Sukh Devi.

Now, we have the testimony of three witnesses, Ranjit, Khuba and Bhikan, to the effect that on the night in question they were awakened by a noise; and that when they hastened to the place from which the noise emanated, they saw the four male prisoners beating Mai Dhan with sticks. *Musammat* Sukh Devi was, at that time, sitting on a *charpoy* at a distance of about eight yards, and was urging the assailants to kill their victim. She was telling them that if Mai Dhan survived, he would get them into trouble.

We have subjected the evidence of these witnesses to a careful scrutiny and are unable to discover any valid reason for holding that they are not telling the truth. The witnesses are *chamars* by caste and appear to be disinterested. It will be observed that their names were disclosed at once, and, indeed, there is reliable evidence to the effect that when the *chaukidar*, the *lambardar* and the Head Constable reached the scene of the occurrence, they saw the four male prisoners standing at a short distance from the place where the deceased was lying; and that all of them were armed with sticks. The prisoner Dhani, at that time, produced three ornaments in support of the explanation that Mai Dhan was beaten while he was in the act of removing those ornaments from the person of *Musammat* Sukh Devi. This defence has now been abandoned by the male prisoners, but it is still invoked by *Musammat* Sukh Devi. The learned Sessions Judge rightly points out that it is improbable that Mai Dhan would go and

commit theft at 10 P.M., more especially when the night was a moon lit one. It is unnecessary to labour the point, for there is no reliable evidence in support of the theory that Mai Dhan committed any theft on that night, or that he did any other act which called for the exercise of the right of private defence.

There is, however, one matter deposed to by the witnesses for the prosecution which might excite some suspicion. As pointed out above, Mai Dhan was not on good terms with Gordhan, and it would seem strange that he should have accompanied his enemy on the night in question. It is, however, possible that Mai Dhan overcame his reluctance and left his house in the company of Gordhan when the latter urged that he had to talk to him over an urgent matter; and that the deceased, who was a strong and a bold man, had no suspicion at that time that his adversary intended to do any harm to him. Be that as it may, the evidence of the eye-witnesses leaves no doubt that the four prisoners mentioned above participated in the assault which resulted in the death of Mai Dhan, and that they are all guilty of murder. In view of the nature and the number of the injuries inflicted upon the victim, we are not prepared to interfere with the sentence of death inflicted upon Gordhan.

The direct evidence referred to above makes it also clear that *Musammat* Sukh Devi instigated the assailants to kill their victim, and that her act amounts to an abetment of the offence of murder. She has, therefore, been rightly convicted under s. 302 read with s. 114 of the Indian Penal Code.

The result of the above discussion is that we uphold the conviction of the five prisoners, and confirming the sentence of death imposed upon Gordhan, we dismiss their appeals.

A. N. A. *Appeal dismissed.*

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 125 OF 1926.

February 25, 1926.

Present :—Justice Sir Charu Chandra Ghose, Kt., and Mr. Justice Duval.

Sheikh SAMIR—PETITIONER

versus

SAJIDAR RAHMAN—OPPOSITE PARTY.

Cr. P.C. (Act V of 1898), ss. 195, 476—Penal Code (Act XLV of 1860), s. 211—Complaint before Police followed by complaint in Court—Dismissal of case—False charge, prosecution for—Complaint by Court, whether necessary.

Accused made a complaint before the Police charging the petitioner and others with certain offences but the complaint was filed. The petitioner then made a complaint against the accused under s. 211 of the Penal Code and the Magistrate issued process against the accused. Thereupon the accused appeared and laid a complaint before the Magistrate against the petitioner upon the same facts which he had alleged before the Police. The Magistrate after taking evidence in the case against the petitioner acquitted him :

Held, that the case instituted by the accused against the petitioner having been tried by a Magistrate, no prosecution of the accused under s. 211 of the Penal Code could be instituted without a complaint being made by the Court which had tried the other case.

Criminal Revision against an order of the Presidency Magistrate, Calcutta, dated the 14th December, 1925.

Babu *Prabodh Chandra Chatterje*, for the Petitioner.

Babus *Mrityunjoy Chatterjee* and *Biraj Mohan Roy*, for the Opposite Party.

JUDGMENT.—In this matter what has happened is this. The accused, Sajidar Rahman, made a complaint before the Deputy Commissioner of Police on the 18th February, 1925, charging the petitioner and others with having, on the 16th February, 1925, in front of the Registration Office on the north side of the Government House, snatched away two Government currency notes for Rs. 1,000 each. The Police submitted a report on the 2nd March, 1925, but the accused, Sajidar Rahman, not having been found in Calcutta, the Deputy Commissioner of Police ordered, on the 2nd April, 1925, that the petition should be filed. On the 9th April the petitioner filed a complaint against the accused, Sajidar Rahman, under s. 211 of the Indian Penal Code for having falsely and maliciously filed the said complaint before the Deputy Commissioner of Police. The Chief Presidency Magistrate issued process against Sajidar Rahman on the 4th May, 1925. Thereupon Sajidar Rahman appeared and laid a complaint against the petitioner, on the 10th June, 1925, and the petitioner was charged with offences under ss. 420 and 403 of the Indian Penal Code. Both the cases were transferred to Mr. H. K. De, Presidency Magistrate, for trial. Mr. De, after taking evidence in the case against the petitioner acquitted him, under s. 258 of the Cr. P. C., on the 14th December

1925. The petitioner thereupon applied to the Magistrate that the case by him against the accused should be proceeded with. Mr. De, however, held that the case by the petitioner against the accused should not be proceeded with, having regard to what he had found in the counter-case, and he thereupon discharged the accused, Sajidar Rahman, under s. 253 of the Cr. P. C.

It appears to us that the allegations in the two cases were more or less the same, and, therefore, no prosecution under s. 211 of the Indian Penal Code is sustainable without complaint being first made by the Court which tried the case of the accused against the petitioner [See in this connection *Brown* v. *Ananda Lal Mullick* (1).] On that short ground we are of opinion that this Rule fails, and we accordingly discharge it.

Z. K. *Rule discharged.*

(1) 36 Ind. Cas. 857; 44 C. 650; 20 C. W. N. 1347; 18 Cr. L. J. 25; 25 C. L. J. 59.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 854 OF 1925.

December 11, 1925.

Present:—Mr. Justice Martineau and Mr. Justice Fforde.

JAGAT SINGH—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 302, 304—Murder—Intention, importance of—Sudden fight—Death caused by striking with pocket knife—Conviction for murder, legality of.

Where an accused in a sudden fight struck a blow with a pocket clasp knife at another who was grappling with him from behind and the latter died as a result of the blow :

Held, that the accused can be convicted only under s. 304 and not under s. 302 inasmuch as he cannot be held to have had the intention necessary to constitute murder. [p. 120, col. 1.]

Criminal appeal from an order of the Sessions Judge, Jullundur, dated the 20th August, 1925.

Mr. *Mukand Lal Puri* and Lala *Hari Das Bedi*, for the Appellant.

Mr. *Des Raj Sahney*, Public Prosecutor, for the Respondent.

JUDGMENT.—The appellant, Jagat Singh, has been convicted under the provisions of s. 302, Indian Penal Code, of having on the 1st of May, 1925, murdered a certain Hazara Singh.

The facts shortly stated are as follows :—

On the 1st of May one Dharm Singh was sitting in a shop in the village of Dhani Pind together with other persons when the appellant came up. Dharm Singh demanded from him some money which he declared the appellant owed him. Upon this an altercation arose between the two men resulting in a fight. The evidence of what occurred in the course of this fight is somewhat discrepant. According to the prosecution story the appellant first attacked Dharm Singh, then turned upon Hazara Singh, who was running to the scene, and stabbed him in the neck with a pocket knife. Dharm Singh and Mehr Singh then tried to seize the accused and wrest the knife from him, but only succeeded in getting their hands cut in the attempt. Other persons coming up the appellant made off. Hazara Singh died from the effects of his injury. In the First Information Report Dharm Singh described the scene as follows :—

"I demanded my money from him (Jagat Singh). But he abused me and refused to pay the money. I too abused him. Then we grappled with each other. Jagat Singh is a strong man so a noise arose. Then Banta, son of Rala, *Jat* of the village, a friend of Jagat Singh, came up there. He too attacked me. In the meanwhile my nephew Hazara came running and caught Jagat Singh into his arms. My son Mehr also came up there. Then Jagat Singh let me off and at once taking a knife out of his pocket struck at the neck of Hazara."

In his evidence in Court this witness considerably improved upon his statement. He there said that when the fight between himself and the appellant was taking place, Mehr Singh and Hazara Singh were some distance off and that when Hazara Singh was about four *karams* from the appellant the latter ran towards him to attack him with a knife, and that when this assault upon Hazara Singh took place Mehr Singh was about 15 or 20 *karams* away. This version is not supported by the other prosecution witnesses. Mehr Singh himself says that when the appellant was struggling with Dharm Singh 'Hazara Singh tried to catch hold of the accused. The accused then let go my father and taking out a knife he opened it and drove

it into the neck of Hazara.' Neither Dharm Singh nor any other witness mentioned in Court that Banta took part in the assault on Dharm Singh.

Three witnesses were called for the defence; one of whom Milkha Singh gives an account of the fight which appears to us convincing and in accordance with the medical evidence of the injuries received by Jagat Singh himself. It is a significant fact that the appellant Jagat Singh received no less than eleven injuries, mostly on the right forearm and hands. This suggests that he was shielding his head from blows struck at him with some blunt weapon. The medical witness states that the injuries were simple and "seemed to have been caused by some blunt weapon." The witness on being pressed stated that the blows could not have been caused by fist but could have been caused by a *lathi*. It is true that this witness also stated that it is more probable that the injuries were received by a fall rather than by *lathi* blows. It is hard to understand, however, how a fall could have occasioned eleven injuries in such different parts of the body.

The view which we take of the evidence is, that Dharm Singh started to abuse the appellant for not paying some debt alleged to be due to him, that thereupon the two engaged in a fight, in the course of which Dharm Singh's son and nephew, Mehar Singh and Hazara Singh, assisted him; that one or more of the persons were attacking the appellant with a stick; that Hazara Singh grappled with him from behind, and that the appellant then struck at him with his pocket knife without any deliberate aim. The knife in question is an ordinary kind of clasp knife with a blade somewhat shorter than the handle. The appellant gave one blow with the knife and in doing so we do not think that he intended to cause death or to inflict such injury as was likely to cause death though, in our opinion, he must have known that a blow with a weapon of this kind was likely to cause death.

For the reasons we have given we are of opinion that the case comes within the provisions of s. 304-II of the Indian Penal Code. We accordingly set aside the conviction and sentence imposed under the provisions of s. 302, Indian Penal Code, and altering the conviction to one under s. 304-II, we reduce the sentence to one of three years' rigorous imprisonment. To this extent the appeal is accepted.

A. N. A. *Appeal partly accepted.*

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 526 OF 1926.

October 7, 1926.

Present:—Mr. Justice Banerji.

ATMA RAM AND OTHERS—ACCUSED—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Cr. P. C. (Act V of 1898), s. 106—Security proceedings—Conviction for simple hurt—No finding of breach of peace—Binding over, legality of—Summary trial—Notes of evidence-Magistrate's duty to record and preserve.

Although the object of summary procedure is to shorten the course of a trial it is nevertheless incumbent on a Magistrate to put on record sufficient evidence to justify his order. The notes of evidence should form part of the record and their destruction renders a conviction improper.

An order under s. 106, Cr. P. C., can be passed against a person on a conviction for simple hurt only when it is found that the offence involved a breach of the peace.

Criminal Reference made by the Sessions Judge, Meerut.

REFERRING ORDER.—This is an application for revision of an order of Mr. Piarey Lal, Barrister-at-law, First Class Special Magistrate of Meerut, convicting the applicants under s. 323 of the Indian Penal Code and sentencing them to a fine of Rs. 25 each and also ordering them to execute a bond in Rs. 100 each to keep the peace for one year.

Only two points are urged in revision. The first is that the Magistrate tried the case summarily, but he did not record any notes of evidence or at any rate did not preserve any notes of evidence on the record. The second is that the order passed under s. 106 of the Cr. P. C. is illegal.

Now with regard to the first point the Magistrate himself says that he did make some notes of the evidence of the witnesses for his own information but he did not preserve these notes and keep them on the record. He says he was not required to do so. Now there can be no doubt that a certain number of witnesses were examined in this case, but it does not appear from the judgment as to who these witnesses were. There is a reference to the evidence of three witnesses only, but the names of two are not disclosed. The name of the

only witness which is disclosed in the judgment is Dr. Murari Lal. He must have examined the injuries of one of the complainants. There is, therefore, nothing in the judgment itself which could show what the evidence of these witnesses was and, as admitted by the learned Magistrate, there are notes of evidence kept on the record. So far it is clear. But it is contended on behalf of the applicants that although the object of a summary procedure is to shorten the course of a trial it is nevertheless incumbent on the Magistrate to put on record sufficient evidence to justify his order. In support of this contention reliance is placed on *Ainuddi Sheikh* v. *Queen-Empress* (1). It is also contended that if at the commencement of the trial the Magistrate is unable to determine whether the proper sentence to be passed should be an appealable one or not he must make a memorandum of the substance of the evidence of each witness as his examination proceeds. It is further urged that if he actually does so the notes of the evidence must form part of the record of the case and cannot be destroyed by him. And it is lastly contended that where the Magistrate does record the evidence but subsequently destroys the notes the conviction must be set aside. In support of this contention reliance is placed upon *Satish Chandra Mitra* v. *Emperor* (2). Now if these two rulings of the Calcutta High Court are followed then the applicants have made out a good case for interference. The question is if these rulings ought to be followed. In my opinion these rulings should be followed specially when there is no ruling to the contrary of the Hon'ble High Court of Allahabad. I, therefore, hold that the destruction of the notes of evidence has rendered the conviction improper.

With regard to the second point the case of the applicants is clear. It was a case under s. 323 of the Indian Penal Code and it arose simply on account of a sudden altercation over a trivial matter. Now s. 323 of the Indian Penal Code is not an offence referred to in s. 106 of the Cr. P. C., but even then an order can be passed after a conviction under this section if it was found by the Magistrate that the offence involved a breach of the peace. But there must be a finding of the Magistrate; otherwise his order is not justified. In *Muhammad Rahim* v. *Emperor* (3) it was laid down that an order under this section can only be passed when in a case of causing simple hurt a breach of the peace is involved. It was also held that the Magistrate cannot merely on the ground that the parties were on bad terms bind the accused down. Under these circumstances I hold that the order passed under s. 106 of the Cr. P. C. is not legal.

I, therefore, submit this case to the Hon'ble High Court with a recommendation that the conviction of the applicants under s. 323 of the Indian Penal Code and the order under s. 106 of the Cr. P. C. both be set aside and such further orders may be passed by the Hon'ble Court as are deemed fit. The record shall be submitted to the Hon'ble Court after the explanation, if any, of the Magistrate concerned is received.

Mr. *Sailanath Mukerji*, for the Applicants.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—I accept the Reference. It is unnecessary to order a re-trial. The fines, if paid, will be refunded.

A. N. A. *Reference accepted.*

(1) 27 C. 450; 14 Ind. Dec. (N. s.) 296.

(2) 61 Ind. Cas. 846; 48 C. 280; 32 C. L. J. 451; 22 Cr. L. J. 462.

(3) 89 Ind. Cas. 1025; 23 A. L. J. 1053; 26 Cr. L. J. 1457; A. I. R. 1926 All. 144.

LAHORE HIGH COURT.

CRIMINAL REVISION No. 524 OF 1926.

September 29, 1926.

Present :—Mr. Justice Broadway.

HAZARA SINGH AND OTHERS—ACCUSED—PETITIONERS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 366—Intention to commit illicit intercourse—Burden of proof—Intention, whether can be presumed.

The accused in broad day light assaulted a woman and endeavoured to take her away from her husband who was accompanying her. The lower Courts raised a presumption that the intention of the accused was to cause the woman to commit illicit intercourse and convicted them under s. 366, Indian Penal Code:

Held, that intention has to be proved like any other fact though it may be deduced from the conduct of the parties; that the lower Courts were not justified in raising a presumption as to the intention of the accused; and that the conviction of the accused under s. 366, Indian Penal Code was, therefore, illegal. [p. 122, col. 2.]

Petition for revision of an order of the Sessions Judge, Lahore, dated the 2nd March, 1926.

Dr. *Nand Lal*, for the Petitioners.

JUDGMENT.—The three petitioners in this case, Hazara Singh, Bahal Singh and Janga Singh, were convicted of an offence under s. 366 of the Indian Penal Code and sentenced to four years' rigorous imprisonment, including three months' solitary confinement and to pay a fine of Rs. 200 each or in default to undergo further rigorous imprisonment for a period of six months.

On appeal to the Sessions Court the learned Sessions Judge while upholding the conviction in the case of each of these three persons reduced the sentence to 18 months' rigorous imprisonment including two months' solitary confinement and a fine of Rs. 50 each, or, in default, two months' further rigorous imprisonment. They have now come up to this Court under s. 439 of the Cr. P. C., and it has been contended that the conviction under s. 366 of the Indian Penal Code is bad in law.

The facts briefly are these. On the 31st May, 1925, Gulab and his wife *Musammat* Fatti were proceeding from one *Chak* to another when they were suddenly set upon by the three petitioners who assaulted Gulab and seizing hold of *Musammat* Fatti started to drag or carry her off. Gulab and *Musammat* Fatti raised an alarm which attracted the attention of Saudagar and other persons whereupon the petitioners left the woman and ran away.

The Magistrate and the learned Sessions Judge have accepted this statement as correct. The learned Magistrate, in framing the charge against these three petitioners attributed to them the intention to compel *Musammat* Fatti to illicit intercourse. As a matter of fact, there is no evidence on the record from which it can be definitely held that that was their intention. Mere abduction without criminal intent of one of the kinds specified in the Indian Penal Code is not recognized as an offence. This was apparently realised by the learned Magistrate for he specified what he considered to be the intention of the petitioners in laying hold of *Musammat* Fatti. The learned Sessions Judge did not apparentiy direct his attention to this point. He says that "after reading and considering the whole I am of opinion that it is established that the three appellants did, on the day in question, assault the complainant, and catch hold of *Musammat* Fatti and endeavour to take her away from her husband intending, no doubt, the completion of the offence under s. 366 of the Indian Penal Code."

It seems to me that both the Magistrate and the learned Sessions Judge have raised the presumption that it was the intention of the three petitioners to cause *Musammat* Fatti to commit illicit intercourse. There is nothing that I have been able to discover which warrants that presumption.

Intention has to be proved like any other fact and may, of course, be deduced from the conduct of the parties. In the present instance the assault was committed in broad daylight. The husband was attacked and the woman seized and dragged away. I do not think it justifiable in these circumstances to attribute to the petitioners the intention entered in the charge-sheet, nor any of the intentions referred to in s. 366 of the Indian Penal Code.

I, therefore, accept this petition and set aside the conviction under s. 366, Indian Penal Code. At the same time there can be no doubt that they are guilty of an assault and I, therefore, alter their conviction to one under s. 325 of the Indian Penal Code. They were convicted on the 28th October, 1925, and released on bail soon after 15th July, 1926. In these circumstances I consider that the sentences they have undergone will be sufficient in the case of each of them. I, therefore, direct that they be discharged from their bail-bonds. The fine will stand.

A. N. A. *Revision accepted.*

OUDH CHIEF COURT.

CRIMINAL APPEAL No. 341 OF 1926.

September 16, 1926.

Present:—Sir Louis Stuart, KT., Chief Judge.

GULZARI LAL—ACCUSED—APPELLANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 167, 467, 471—Forgery—Public servant framing incorrect document—Conviction under s. 167 and ss. 467 and 471, legality of.

A public servant who frames an incorrect document with intent to cause injury cannot be convicted both under s. 167 and ss. 467 and 471, Indian Penal Code, inasmuch as the offence under s. 167 is included in the offence of forging a document and using it as genuine under ss. 467 and 471.

Appeal against an order of the Additional Sessions Judge, Unao, dated the 21st August, 1926.

Mr. *R. Bahadurji*, for the Appellant.

Mr. *G. H. Thomas*, for the Crown.

JUDGMENT.—The appellant has had the advantage of having his appeal placed before this Court as well as it could be placed, but his learned Counsel has been unable to show me that he was not properly convicted. There can be no doubt as to the fact that pages were taken out of the genuine *khetauni* for 1330 *F.* which had been prepared by the appellant, and that in their places were inserted pages, which contained incorrect entries which were subsequently used to defraud the Crown.

I am satisfied that the appellant with his own hand prepared the pages containing the incorrect entries and himself inserted them in places of the genuine pages. The evidence to that effect is credible and I see no reason not to believe it. I do not consider that he can be convicted both under the provisions of s. 167 and ss. 467/471. The offence under s. 167 is to my mind included in the latter offence. While, therefore, considering that he has been rightly convicted and upholding his conviction under ss. 467/471, Indian Penal Code, and the sentence of three years' rigorous imprisonment, and the fine of Rs. 100 passed upon him, I set aside his conviction under s. 167 and the sentence passed upon him thereunder. To this extent the appeal is successful.

A. N. A. *Appeal partly allowed.*

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 583 OF 1926.

October 5, 1926.

Present:—Mr. Justice Banerji.

RAM CHAND—ACCUSED—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Cr. P C. (Act V of 1898), s. 439—Revision—Finding of fact—Interference in revision—Evidence—Reports on secret enquiries, admissibility of.

Although it is unusual to look into the evidence in a criminal revision and a finding of fact will not ordinarily be disturbed, where a finding is arrived at by a process which has vitiated the whole proceedings, the High Court can interfere in revision.

Reports made by a Tahsildar on secret enquiries under the orders of a Sub-Divisional Officer are quite inadmissible in evidence in a criminal trial.

Criminal revision from an order of the Sessions Judge, Muttra, dated the 6th September, 1926.

Messrs. *Saila Nath Mukerji* and *Hanuman Prasad Agarwal*, for the Applicant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—This is an application in revision under the following circumstances :—

Ram Chand and two others were charged with having on the 11th of February, 1926, cheated Ghurey and certain others of Rs. 8. This amount is said to have been paid because Ram Chand, vaccinator, found rubbish in front of houses of certain men and asked Ghurey to pay up Rs. 8. The learned Magistrate convicted all the three persons, but the Sessions Judge in appeal has acquitted the two *Patwaris* and has altered the conviction of Ram Chand from one under s. 420 of the Indian Penal Code to one under s. 161. I am of opinion, that this conviction cannot stand. It is alleged that the occurrence took place on the 11th of February, 1926. Sometime in March the present petitioner reported that a number of people in the village in question had collected rubbish in front of their houses. Thereafter certain anonymous letters were sent to the Sub-Divisional Officer and a Tahsildar and a Naib-Tahsildar made secret enquiries and submitted their reports. It was not till the 1st of June, 1926, that the present complaint was filed. Curiously enough both the Courts below have treated the report of the Tahsildar as evidence and have acted thereon. The Court of first instance, no doubt, gave clear findings about the evidence of the witnesses, but the performance of the learned Sessions Judge appears to me to be very peculiar. He has practically disbelieved the whole of the prosecution evidence with reference to two or more of the accused persons. He has gone on to consider the reports of the Tahsildar and the Naib-Tahsildar and peruse the evidence which was called before the Tahsildar. How all that is evidence cannot be explained by the Government Pleader. I am not aware of any

provision of law which permits such reports to be used as substantive evidence. After disbelieving practically everything, the learned Judge believes the evidence for the prosecution and alters the conviction of Ram Chand, as I have already stated, from one under s. 420 of the Indian Penal Code to one under s. 161. Although it is unusual to look into the evidence in a case in revision and although a finding of fact arrived at by the Court below is not disturbed in revision, in this case the process adopted by the learned Sessions Judge to my mind has vitiated the whole of the proceedings. He has given very good reasons for holding that the witnesses for the prosecution have deliberately fabricated a false case against two of the accused persons. I am unable to accept the evidence of such liars against any one.

I set aside the conviction and sentence passed on Ram Chand. He will be released at once.

A. N. A. *Conviction set aside.*

CALCUTTA HIGH COURT.

CIVIL REVISION No. 1 OF 1926.

March 12, 1926.

Present:—Justice Sir Charu Chunder Ghose, KT., and Mr. Justice Duval.

NASARUDDIN KHAN—PETITIONER

versus

EMPEROR—RESPONDENT.

Cr. P. C. (Act V of 1898), ss. 476, 476B—C. P. C. (Act V of 1908), s. 115, O. XLI, rr. 11, 17—Complaint by Civil Court—Appeal—Procedure—Default of appearance—Dismissal of appeal—Revision.

The language of s. 476B of the Cr. P. C. indicates with sufficient clearness that the Court to which an appeal lies under that section is one to which the Court making or filing the complaint is subordinate; in other words, if it is a Civil Court which has made an order under s. 476 of the Cr. P. C., the appeal against such an order must lie to and be heard by the authority or tribunal to which such Civil Court is subordinate and the procedure governing an appeal of this description is that prescribed by the C. P. C. for the hearing of an appeal. Where such an appeal is argued in part by the Counsel for the appellant and is then adjourned but at the adjourned hearing the Counsel for the appellant does not turn up, the Court is entitled to assume that the appeal has been abandoned and to dismiss it. In following this course the Court cannot be said to commit any illegality or material irregularity within the meaning of s. 115 of the C. P. C. [p. 125, col. 2; p. 126, col. 1.]

Civil revision against an order of the District Judge, Mymensingh, dated the 11th November, 1925.

Mr. *Monnier* (with him Babu *Jahnabi Charan Das Gupta*), for the Petitioner.

Mr. *K. N. Chaudhuri* (with him Babu *Kali Kinkar Chakravarti*), for the Crown.

JUDGMENT.—This is a Rule calling upon the District Magistrate of Mymensingh to show cause why the orders of the District Judge of Mymensingh, dated the 28th October, 1925, and 11th November, 1925, should not be set aside or such other or further order made as to this Court may seem fit and proper on the ground that the District Judge had no jurisdiction whatever to dismiss the appeal of the petitioners, under s. 423 of Cr. P. C. without looking into the record and considering the same.

In order to understand the precise significance of the ground taken in this Rule, it will be necessary to set out briefly the facts giving rise to the appeal, the dismissal of which has led to the present application being made to us. The facts are as follows. It appears that the Additional Munsif, Sadar, in the District of Mymensingh, decreed a suit in ejectment brought by Raja Jagat Kishore Acharya Chowdhry against the petitioners. Thereafter, the learned Munsif, at the instance of the plaintiff, filed a complaint before the Magistrate against the said petitioners—Nasaruddin Khan and Madan Sheikh—for having committed certain offences punishable under ss. 193, 465, 467 and 471 of the Indian Penal Code. This complaint was one which was made under s. 476 of the Cr. P. C. Thereafter, an appeal was filed before the District Judge against the order of the Munsif making or filing the said complaint. It was registered as Miscellaneous Appeal No. 280 of 1924. The appeal was admitted by the District Judge on the 24th September, 1924, and it came on for hearing after service of notice on the respondents and after the record had been called for, before the District Judge on the 5th December, 1924, when, it appears, the Pleader for the appellants, after arguing the appeal for some time, stated that he could not proceed further with the appeal on that date as he was engaged otherwise and as the arguments would take some time. The hearing of the appeal was adjourned, and it appears that the matter did not come on again before the District Judge till the 22nd December, 1924, when it was thought desir-

able that the appeal, which the appellants, that is, Nasaruddin Khan and Madan Sheikh, had filed against the decree of the Munsif in the said suit, should be heard along with the appeal against the order of the Munsif filing or making the complaint under the provisions of s. 476 of the Cr. P. C. The hearing of this appeal, that is to say, the appeal against the order of the Munsif filing or making the complaint, was accordingly adjourned. It next came on for hearing on 28th October, 1925, before the District Judge, when the Pleaders for the appellants were absent and the Pleader for the respondent was present. The District Judge, after looking into the record, found that the hearing by the Magistrate of the complaint made by the Munsif had been delayed for more than a year; he came to the conclusion that no further time could be allowed, and he thereupon dismissed the appeal. An application for revival of the appeal was filed, and that came on for hearing before the District Judge on 11th November, 1925. The District Judge, after hearing the parties, was of opinion that he was unable to re-admit the appeal, and he, accordingly, affirmed the order which had been previously made by him and rejected the application for revival of the appeal. Against the two last mentioned orders the present petition was filed and the present Rule obtained.

Mr. Chaudhuri, who appears for the Crown, argues that by the terms of s. 476B, the appeal against the order of the Munsif, filing or making the complaint under s. 476 of the Cr. P. C., lay to the Court to which the Court making the order or filing the complaint was subordinate within the meaning of s. 195 (3); in other words, Mr. Chaudhuri's contention is that the appeal from the order of the Munsif making or filing the complaint lay to the District Judge, and the appeal was one which was governed by the provisions of the C. P. C. and not by the Cr. P. C. Mr. Monnier, who appears in support of the Rule, argues that the appeal is one which is allowed by and under a section of the Cr. P. C., namely, s. 476B, and that there is nothing whatsoever in the Cr. P. C. negativing the contention that the appeal is governed by the provisions of the Cr. P. C. In the second place, he argues that the C. P. C. has no application whatsoever to an appeal of this description, and that, having regard to Ch. XXXI. of the Cr. P. C., it must follow that the appeal is one governed by the provisions of the Cr. P. C., and if that is so, then under s. 423 of the Cr. P. C., the learned Judge who disposed of the appeal was in error in disposing of the same without considering the matters on the record in the appeal.

These being the respective contentions of the parties, it is now our duty to examine the same. No doubt the appeal in this case is one which is given by s. 476B of the Cr. P. C., but the very words used in s. 476B of the Cr. P. C., indicate with sufficient clearness that the Court to which the appeal lies is one to which the Court making or filing the complaint is subordinate; in other words, if it is a Civil Court which has made an order under s. 476 of the Cr. P. C., the appeal against such an order must lie to and be heard by the authority or tribunal to which such Civil Court is subordinate. It follows, therefore, that the original order, having been made by a Munsif in a civil suit, the appeal against an order by the Munsif under s. 476 of the Cr. P. C. lay to the District Judge to whom the Munsif was subordinate. Therefore, it would follow that, although the appeal itself is one which is allowed by the Cr. P. C., the appeal must be heard by the District Judge to whom the Munsif is subordinate, *i. e.*, by an Appellate Court exercising civil appellate jurisdiction. It follows, therefore, that the procedure governing an appeal of this description is one which is to be sought for within the four corners of the C. P. C. It follows also that the provisions of the C. P. C. being applicable to an appeal of this nature, the District Judge was, in our opinion, fully competent in making the orders which he did on the two dates referred to above. The relative provisions governing appeals in matters of this description are to be found in O. XLI of the C. P. C. It was a part-heard appeal. The appeal was admitted in September, 1924. It came on for hearing for the first time in December, 1924. It stood over from time to time till it was reached on the 22nd June, 1925. It stood over for a further period, and was not reached till the 28th October, 1925, when, as stated above, the learned Pleaders who had been engaged to appear in support of the appeal were found to be absent. Under these circumstances, the District Judge was, in our opinion, fully entitled to consider that the appeal had been abandoned by and on behalf of the appellants,

Under these circumstances, we do not see that the District Judge has been guilty of any illegality or of any material irregularity within the meaning of s. 115 of the C. P. C., nor does it seem to us that there has been anything done by the District Judge to which exception can be taken, and in respect of which our powers of superintendence under the provisions of s. 107 of the Government of India Act can be invoked.

The result, therefore, is that there is absolutely no substance in the present Rule, and it must be discharged.

Z. K. *Rule discharged.*

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 490 OF 1926.

October 22, 1926.

Present:—Mr. Justice Kendall.

Musammat TIRBENI—APPLICANT

versus

Musammat BHAGWATI

—OPPOSITE PARTY.

Cr. P. C. (Act V of 1898), s. 205—Parda *lady—Personal appearance in Court—Revision of order relating to personal appearance.*

The High Court may in a proper case interfere with an order of a Magistrate under s. 205, Cr. P. C., rejecting an application by a *pardanashin* lady to be excused from personal appearance in Court though ordinarily such matters will be left to the discretion of the Magistrate.

The mere fact that certain ladies who were related to a *parda* lady appeared in Court voluntarily is no ground for enforcing personal appearance of the latter.

Criminal Reference made by the Sessions Judge, Meerut, dated the 2nd of July, 1926.

Mr. *A. Sanyal*, for the Applicant.

Mr. *I. B. Banerji*, for the Opposite Party.

JUDGMENT.—This is a Reference by the Sessions Judge of Meerut under s. 438, Cr. P. C., recommending that the order of Mr. Puech, Special Magistrate of First Class of Meerut, rejecting the application of *Musammat* Tirbeni to be excused from personal attendance in his Court under s. 205, Cr. P. C., should be set aside. The facts appear to be that two ladies made cross-complaints against each other under ss. 323 and 452, Indian Penal Code, and both those ladies appeared in Court; but *Musammat* Tirbeni, who is accused in one of the cases but who had not made any complaint, did not appear in Court. All the ladies belong to a class that observes *parda*, and the Magistrate's chief reason for refusing to excuse *Musammat* Tirbeni's personal attendance was that the other ladies, who were related to her, had appeared in Court; but, as the learned Sessions Judge has pointed out, they did so of their own free-will. The matter appears to be a trivial one from the point of view of the administration of justice, and it is one that would, in the ordinary course, be left to the discretion of the Magistrate; but my attention has been drawn to a case in which a Judge of this Court did interfere in revision in very similar circumstances [*vide In the matter of the petition of Rahim Bibi* (1).]

As the view taken by the learned Sessions Judge appears to me to be perfectly correct, I accept his recommendation and direct the Magistrate to proceed with his enquiry and to dispense with the attendance of *Musammat* Tirbeni, at any rate until such time as there shall be sufficient evidence on his record to give him reason to suppose that she has been guilty of the offence of which she has been accused.

A. N. A. *Reference accepted.*

(1) 6 A. 59; A. W. N. (1883) 207; 3 Ind. Dec. (N. S.) 631.

ALLAHABAD HIGH COURT.

CRIMINAL MISCELLANEOUS CASE No. 249 OF 1926.

November 8, 1926.

Present:—Mr. Justice Iqbal Ahmad.

BASDEO MISRA—APPLICANT

versus

BADAL MISRA AND OTHERS—OPPOSITE PARTIES.

Cr. P. C. (Act V of 1898), ss. 5, 526—Village Panchayat, *case pending before—Transfer of case—High Court, power of.*

The High Court has jurisdiction under s. 526 of the Cr. P. C. read with s. 5 of the Code to transfer a case pending before a Village *Panchayat*. [p. 127, col. 2.]

Criminal miscellaneous application for transfer.

Mr. *S. D. Sinha*, for the Applicant.

Mr. *A. P. Pandey*, for the Opposite Parties.

The Government Advocate, for the Crown.

JUDGMENT.—This is an application for transfer of a case under s. 323 of the Indian Penal Code (*Basdeo Misra* v. *Badal Misra and others*) pending in the *Panchayat* at Sonbarsa.

A preliminary objection is taken to the hearing of this application by Mr. Pandey on the ground that a *Panchayat* constituted

under the provisions of Act VI of 1920 (United Provinces Village Panchayat Act) is not a Court within the meaning of Ch. II of the Cr. P. C, and as it is not a Criminal Court within the meaning of that Act, s. 526 of the Cr. P. C. has no application, and as such this Court has no jurisdiction to transfer a case pending before a *Panchayat.*

The matter was considered by a Division Bench of this Court in the case of *Sat Narain* v. *Sarju* (1). One of the learned Judges was of opinion that a *panchayat* constituted under the provisions of the Local Act referred to above is not a "Criminal Court" and as such this Court has no jurisdiction under s. 526 of the Cr. P. C. to transfer a case pending before a *panchayat.* He was further of opinion that s. 22 of the Letters Patent did not vest jurisdiction in this Court to transfer a case from a Village *Panchayat.*

The other learned Judge constituting the Bench was of a contrary opinion. He held that the Village *Panchayat* must be deemed to be a Court for the purpose of s. 22 of the Letters Patent, and as such "the High Court has power under that section to transfer any criminal proceeding pending before the Village *Panchayat* to another Village *Panchayat* empowered to take cognizance thereof."

The same question arose for consideration in the case of *Kamlapati Punth* v. *Emperor* (2) and the learned Judges constituting the Bench made the following observation :—

"But as we have had to consider at some length the question of the jurisdiction of this Court we think that we should make some observations in regard thereto though we are not unaware that those observations will be in the nature of *obiter dicta.* We should have little hesitation in coming to the opinion that a Village *Panchayat* constituted and held under Local Act (VI of 1920) is a 'Court' and when it is dealing with a case in regard to an 'offence' that it is a Criminal Court."

Though the observations quoted above are in the nature of *obiter dicta* still they are entitled to the greatest weight.

The main reasons assigned by one of the learned Judges, who decided the case of *Sat Narain* v. *Sarju* (1) for holding that s 526 of the Cr. P. C. has no application to Village *Panchayats* was that such a *Panchayat* was not a "Criminal Court" within the meaning of Ch. II of the Cr. P. C. In view of the observations quoted above to be found in *Kamlapati Panth* v. *Emperor* (2) the reasoning of the learned Judge who held that this Court has no jurisdiction to direct the transfer of a case of a *Panchayat* loses much of its weight. Section 5 of the Cr. P. C. prescribes that all offences under the Indian Penal Code shall be "investigated, enquired into, tried and otherwise dealt with according to the provisions hereinafter contained." I am not sure if this Court does not "otherwise deal with offences under the Indian Penal Code", when this Court in the exercise of the powers vested in it by s. 526 of the Cr. P. C. transfers a case from one Court to another and I am inclined to the view that by s. 5 of the Cr. P. C. read with s. 526 of the same Code, this Court has jurisdiction to transfer cases from Village *Panchayats.*

For the reasons given above, I am of opinion that I have jurisdiction to deal with this matter.

After going through the affidavits filed and hearing the learned Counsel for the parties I have come to the conclusion that this is a fit case which ought to be transferred from the *Panchayat* Court to some other Court competent to try the same.

I direct that the case under s. 323 of the Indian Penal Code (*Basdeo Misra* v. *Badal Misra and others*) be transferred from the *Panchayat* Court at Sonbarsa to the Court of the District Magistrate of Ballia who will make over the case for trial to some other Magistrate subordinate to him and competent to take cognizance of the offence mentioned in the complaint.

Z. K. *Case transferred.*

(1) 83 Ind. Cas. 350; 21 A. L. J. 925; 10 O. & A. L. R. 318; 46 A. 167; A. I. R. 1924 All 265; 25 Cr. L. J. 1390.

(2) 91 Ind. Cas. 51; 23 A. L. J. 897; L. R. 6 A. 179 Cr.; A. I. R. 1926 All. 27; 27 Cr. L. J. 19; 48 A. 23.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 152 OF 1926.
(CRIMINAL REVISION PETITION NO. 135 OF 1926.)
August 24, 1926.

Present:—Mr. Justice Jackson.

In re E. RAMAN CHETTIAR—ACCUSED—PETITIONER.

Cr. P. C. (Act V of 1898), s. 177—Penal Code (Act

XLV of 1860), ss. 109, 420, 468, 511—Attempt, what amounts to—Attempt to cheat by despatch of bogus telegrams—Place of trial.

If the actual transaction has commenced which would have ended in a particular crime if not interrupted, there is an attempt to commit the crime. The word "attempt" conveys with it the idea that if the attempt had succeeded, the offence charged would have been committed.

In a case of cheating an act would amount to an "attempt" if it is an act committed for the purpose and with the intent to bring preparations to bear upon the mind of the person to be deceived.

The accused was charged with an offence under ss. $\frac{468}{109}$ and $\frac{420}{511}$ of the Penal Code on the allegation that at Coonoor he induced one *K* to write bogus telegrams and caused those telegrams to be despatched at Tanjore in order to cheat one *P*:

Held, that the actual transaction which constituted the attempt to cheat did not begin until the telegrams were despatched from Tanjore and that the writing of the telegrams was a mere act of preparation not amounting to an "attempt" and that, therefore, the Tanjore Courts had jurisdiction to try the accused.

Petition, under ss. 435 and 439 of the Cr. P. C., 1898, praying the High Court to revise an order of the Court of the Sub-Divisional Magistrate, Tanjore, dated the 28th May, 1926, in C. C. No. 30 of 1925 (transferred to the Sub-Divisional Magistrate, Kumbakonam, and numbered as C. C. No. 2 of 1926).

Mr. *V. Ramasami Iyer*, for the Petitioner.

The Public Prosecutor, for the Crown.

ORDER.—Petitioner seeks to cancel the charge framed by the Sub-Divisional Magistrate of Tanjore in C. C. No. 2 of 1926 on the ground that the Sub-Divisional Magistrate has no territorial jurisdiction to try the offences in the aforesaid charge.

The petitioner is charged, firstly, that at Coonoor he induced one Krishna Iyer to write bogus telegrams, the offence under ss. 468 and 109, Indian Penal Code, and secondly, that he attempted to cheat one Palaniappa Chettiar by causing the despatch of telegrams at Tanjore, the offence under ss. 420 and 511, Indian Penal Code.

The facts on which the charge is based are that the petitioner at Coonoor gave the telegram for despatch from Tanjore to one Jambulingam Asari. The petitioner contends that any attempt to cheat that he may have made was complete when he gave the telegrams to Jambulingam at Coonoor; and he did nothing afterwards in Tanjore which could be held to be an attempt.

The Public Prosecutor in reply argues that the only act which could be described as an attempt was the despatch of the telegrams, and this petitioner did through his agent Jambulingam. Giving the telegrams to the agent at Coonoor was only preparation. It is very difficult to draw the line between preparation and attempt. In *In the matter of the petition of Riasat Ali* (1) the opinions of the very eminent English Judges are cited, and it is not very clear on what grounds Knox, J., brushes them aside in *In the matter of the petition of R. Mac Crea* (2) as having no bearing upon the Indian Statute. Lord Blackburn says "if the actual transaction has commenced, which would have ended in the crime if not interrupted, there is clearly an attempt to commit the crime." Cockburn, C. J., says: "The word 'attempt' clearly conveys with it the idea that if the attempt had succeeded, the offence charged would have been committed."

In the matter of the petition of R. Mac Crea (2) deals with a case of cheating, and Knox, J., remarks at page 179* that acts are attempts if they are acts committed for the purpose and with the intent to bring preparations to bear upon the mind of the person to be deceived.

It seems clear from these pronouncements that in the offence of cheating the actual transaction must have begun, and an act to bear upon the mind of the victim must have been done before a preparation can be said to be an attempt.

In the present case the actual transaction did not begin until the telegrams were despatched nor until that despatch was any act done to bear upon the mind of the person deceived.

Neither writing the telegrams nor giving them to a messenger for despatch can be said to have been the actual transaction in the sense in which Lord Blackburn used "actual transaction" though such a preparation may be part of the same transaction, in the sense in which transaction without the qualifying adjective 'actual' is used in s. 235, Cr. P. C.

Assuming, therefore, that the petitioner caused the despatch of the telegram at Tanjore, the Tanjore Court should have jurisdiction and there is no reason to interfere.

The petition is dismissed.

V. N. V.

Z. K. *Petition dismissed.*

(1) 7 C. 352; 4 Shome L. R. 155; 8 C. L. R. 572; 3 Ind. Dec. (N. S.) 775.

(2) 15 A. 173; A. W. N. (1893) 71; 7 Ind. Dec. (N. S.) 829.

*Page of 15 A.—[*Ed.*]

OUDH CHIEF COURT.

FIRST CIVIL APPEAL NO. 36 OF 1924.

April 30, 1926.

Present:—Sir Louis Stuart, KT., Chief Judge, and Mr. Justice Raza.

Thakur SUBHA SINGH AND OTHERS —PLAINTIFFS—APPELLANTS

versus

Thakur RUSTAM SINGH AND ANOTHER —DEFENDANTS—RESPONDENTS.

Custom—Proof of custom—Wajib-ul-arz, *entry in, value of—Succession—Ajit Mali Gour Rajputs in Oudh —Family custom, plea of.*

Among the Ajit Mali Gour Rajputs there is no custom whereby contrary to the provisions of the Mitakshara, when the last member of one branch of a family dies and is succeeded by widow, with the widow's estate, then on the death of the widow the other branches take the estate in equal shares without regard to their being more or less remote in kinship to the deceased. [p. 129, col. 2.]

There is no objection to a party pleading that a custom obtains both in a family and in the tribe to which that family belongs, but he must prove that the custom is binding on the family whether he confines his evidence and plea to the family or not. [p. 138, col. 1.]

It is of the essence of usages modifying the ordinary law of succession, that they should be ancient and invariable, and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends. [p. 138, col. 2.]

Where it is not shown by reliable evidence that a Settlement Officer in compiling a *wajib-ul-arz* neglected to perform his duty or was misled in recording a custom and it does not appear that the statement of the custom is ambiguous, the record of a custom in a *wajib-ul-arz* is most valuable evidence of the custom. [p. 134, col. 2.]

Appeal against a decree of the Subordinate Judge, Sitapur, dated the 18th December, 1923.

Messrs. *A. P. Sen*, *H. K. Ghose* and *Kanhaiya Lal*, for the Appellants.

Messrs. *M. Wasim*, *Ali Zaheer*, *Akhlaque Husain*, *Muzaffar Husain* and *Tinkauri Mohan Ghose*, for the Respondents.

JUDGMENT.—This is a plaintiffs' appeal against the dismissal of the suit which they brought for possession of half of the landed property which was owned and possessed by a certain Thakur Hardeo Bakhsh, who is said to have died about 1896. On his death he was succeeded by his widow Umrai Kuar, who died in November 1917. The plaintiffs' case was that under a certain custom, prevalent in the family to which Hardeo Bakhsh belonged and in other families belonging to the same tribe as the family of Hardeo Bakhsh, when the last member of one branch of a family died and was succeeded by his widow, with the widow's estate, on the death of the widow the other branches took the estate in equal shares without regard to their being more or less remote in kinship to the deceased. The success of the plaintiffs' suit depended entirely upon the proof of this alleged custom, for on the facts, as the defendants were entitled to succeed under the Mitakshara Law, which would ordinarily bind the parties, the plaintiffs had no case, if the existence of this custom was not established. The learned Subordinate Judge after consideration of the evidence adduced on both sides decided that the existence of the custom was not established and dismissed the suit. The plaintiffs appeal against this decision.

The relationship between the parties is stated in the pedigree which is recited at the commencement of the judgment of the learned Subordinate Judge. They are descended from a certain Bakhat Singh a Gaur Rajput belonging to a tribe known as the Ajit Mali Gaurs. It appears from the Sitapur Gazetteer Volume 40 of the District Gazetteer of the United Provinces of Agra and Oudh, page 69, that at date, which may be put roughly at the end of the 17th or beginning of 18th century, a certain Raja Chandra Sen a Gaur Rajput, arrived in Oudh. He had four sons Ajit Mal and three others. The descendants of each son formed a separate tribe. The Gaur Rajputs owned a large amount of land in the Sitapur District. This appeal is concerned with the Ajit Mali Gaurs. Bakhat Singh had four sons : Basti Singh, Kewal Singh, Mehrban Singh and Deo Singh. The lines of Basti Singh, Kewal Singh and Deo Singh are now extinct. Hardeo Bakhsh was the last surviving member of the line of Kewal Singh. The plaintiffs and the original defendant Rustam Singh, being the son of Ajudhiya Singh, who was the son of Auseri Singh, who was the son of Mehrban Singh, was nearer in degree to Hardeo Bakhsh than any of the plaintiffs, and under the Mitakshara Law was entitled to succeed to the property of Hardeo Bakhsh on the death of Umrai Kuar. He was alive in 1917 when the lady died.

The appellants have endeavoured to prove the existence of the custom alleged by reference to the *wajib-ul-araez* of villages owned by members of the family, and by putting forward certain alleged instances

of the custom on which they rely having been followed in their own family. They have also endeavoured to support the existence of the custom by referring to the *wajib ul-araez* of villages held by the other Ajit Mali Gaurs in the Sitapur District, who are not members of their family, and by instances of what they alleged to have been succession in accordance with this custom amongst members of these other families. In the trial Court the *wajib ul-araez* were put forward mainly by the defendants to disprove the existence of the custom. In this Court the appellants' learned Counsel has rightly placed the evidence before us as a whole and has discussed the *wajib-ul-araez* and the instances together.

We shall first detail the evidence in so far as it purports to affect the family of Bakhat Singh and shall later detail the evidence in so far as it purports to affect the families of other Ajit Mali Gaur Rajputs in the Sitapur District.

We have been referred to the *wajib ul-araez* of 16 villages which were prepared about 1871 at the Regular Settlement. These *wajib-ul-araez* may be grouped as follows:—They are firstly the *wajib-ul-araez* of—

Alawalpur	Ex. A-1	Pagrohi	Ex. A-2
Mahanandpur	Ex. A-3	Tarpatpur	Ex. A-4
Waizpur	Ex. A-5	Nigohan	Ex. A-6
Mandi Khera	Ex. A-7	Naroipur	Ex. A-8
Kusiari	Ex. A-9	Pichaura	Ex. A-10
Shekhapur	Ex. A-16	Mumtaz-pur	Ex. A-11
Umri	Ex. A-12	Mahal Salempur	Ex. A 13
Kaliyanpur	Ex. A-14	Raipur	Ex. A-15.

The first 11 villages were owned and possessed in 1871 by Hardeo Bakhsh and *Musammat* Mankoa the widow of Ganga Bakhsh Singh. Ganga Bakhsh Singh was the grandson of Deo Singh and the last member of Deo Singh's branch which became extinct after the death of Ganga Bakhsh Singh. The *wajib ul-araez* Ex A-1 to Ex. A-8 were verified by Hardeo Bakhsh himself and by the agent of *Musammat* Mankao. We have not found verifications on Exs. A-9, A-10 and A-16. In Ex. A-1 the *wajib ul arz* of Alawalpur para. 4 "Custom as to inheritance is as follows:—

"In our family, male issue alone inherit. Daughters and their issue have no right of inheritance. Distribution of shares is made according to the number of sons and not according to the number of wives. If, among the uterine brothers, any one dies without issue, then whether he was joint in mess with his uterine brother or not, his uterine and step-brothers shall succeed equally to his property, ancestral as well as self-acquired. The widow, in the event of her not having male issue, becomes owner of her husband's share, irrespective of the nature of the property, and she has the right to effect all kinds of transfer. *After her death the nearest male descendant of her husband's family becomes owner of the heritage left by her.* The custom of adoption exists in our family, but there is this condition that the boy should belong to the family. A boy of a different family, or of a different caste cannot be adopted. A widow is likewise competent to adopt, irrespective of any testamentary devise by her husband but she cannot adopt a boy of her own father's or mother's family. The adopted son is divested of all rights in his natural father's share. If after adoption a son by the wife is born, the adopted son and the son by the wife are entitled to succeed in equal shares. A woman not lawfully married or her issue is not entitled to inherit under any circumstances. Conditionally on her maintaining a good character she is, by leave of the heirs, entitled to food and raiment."

The translator has omitted the word "family" after male descendant of her husband.

Exhibit A-2 is almost word for word the same as Ex. A-1. In Exs. A-3, A-4, A-5, A-6, A-7, A-8, A-9, A-10 and A-16 it is stated that the custom of inheritance is the same as in Alawalpur. The learned Counsel for the appellants has urged that we should substitute for the words "the nearest male descendant of her husband's family becomes owner of the heritage left by her," the words "Whoever amongst the male descendants of her husband's nearest *khandan* (family) will exist will be entitled to the property by right of inheritance," on a proper construction of the passage, but, we are agreed that the construction which he would have us make is not a construction that can possibly be placed upon the words *karib tar khandan ka* which clearly mean the nearest of her husband's family.

We now come to the *wajib-ul-arz* of Mumtazpur (Ex. A-11). This *wajib-ul-arz* was verified by Narpat Singh the father of plaintiffs Nos. 1 to 4, Sanwal Singh the grandfather of plaintiffs Nos. 11 to 13, Raghubar Singh the father of plaintiffs Nos. 8 to 10 and Tilak Singh the father of plaintiff No. 5 and the grandfather of plaintiffs Nos. 6 and 7. The predecessors-in-interest of all the plaintiffs thus verified this *wajib-ul-arz*. The passage as to succession in it is as follows :—

"In our family only the male issue, and neither the daughter nor her issue, is entitled to inherit. In the event of there being male issue by several wives the shares are divided according to the number of sons, without regard to inequality in number of the sons (by the several wives) and not according to the number of wives. If among the brothers by different mothers any one dies without issue then, whether or not he was joint in mess with his full brothers, in ancestral property, the brothers both by the same mother and by different mothers will have equal rights and if the property was acquired by the deceased himself, then the full brother alone will be entitled to succeed. A widowed wife in the absence of male issue becomes owner of her husband's share, irrespective of the nature of the property, and she has power to transfer the property during her lifetime to meet her personal necessities and such (necessities) as (payment of) Government revenue. *After her, whoever among the male descendants of her husband, is the nearest of the kin, becomes owner of her heritage (Uski warasat ka malik hota hai)*, and in our family the custom of adoption exists, but there is this condition attached that the boy should be of the family. A boy of a different family and of a different caste cannot be adopted, and the widowed wife can in the same manner adopt without regard to the provisions of her husband's Will, but the adopted son cannot succeed to the share of his natural father. If after the adoption a male issue is born, then the son born of the wife and the adopted son become owners of the heritage in equal shares. A woman not lawfully married and her issue, are not under any circumstances entitled to inherit, though conditionally on her maintaining a good character she is entitled to food and raiment. If among several wives, some have issue and others are childless then the childless wife is merely entitled to food and raiment by way of maintenance and in our family the right of *jethansi* is not recognised by custom. But at the time when the property of Bhawani Din and our co-sharers was joint Bhawani Din had made over 16 *bighas* (*kham* of land) situate in this village out of his own *haqqiat* to Narpat Singh. At the time of partition among the co-sharers in question that land continued to be included in our *mahal* as joint (*bataur bilijmal hamare* mahal *men shamil chali ayi*) consequently it shall be dealt with in the manner specified in para. 3. The co-sharer in question shall have no rights in any other than this *mahal*."

There is next the *wajib-ul-arz* of Umri (Ex. A-12). This was verified by Ajudhia Singh the father of defendant No. 1 and his brother Bhawani Din Singh. The passage as to inheritance is as follows :—

"In our family, only the male issue, and neither a daughter nor her issue, is entitled to inherit. Where a co sharer dies without issue, his widow provided she is capable shall become owner of property of every description and to meet her personal necessities, and for the purpose of payment of Government revenue, she shall have power to transfer the property in consultation with, and with the consent of members of her husband's family; and so long as members of her husband's family are willing to buy according to market rate, a stranger cannot buy the same and if there are more wives than one and of them has issue, and the other is childless, then in the presence of the (male) issue, the childless widow is not entitled to any share. She will only receive maintenance (*guzara*) and if there are male issues by several wives, their division will take place according to the number of sons and not according to the number of wives. If, among brothers by different mothers, any dies without issue whether or not he was joint in mess with his full brothers, the brothers by the same mother as well as by different mothers, shall be equally entitled. There is no custom of adoption in our family, and a woman not lawfully married, and her issue, are not entitled to inherit under any circumstances, though conditionally on her maintaining a good character she receives food and raiment and

there is no custom in our family recognising the right of "*jethansi*."

The *wajib-ul-arz* of *mahal* Salempur (Ex. A 13) was not verified. That village belonged to Ajudhia Singh, Bhawani Din and Chain Singh. The *wajib-ul-arz* of Raipur (Ex. A-15) was verified by Ajudhia Singh and Bhawani Din. The succession as stated in these *wajib-ul-araez* is almost identical with the succession stated in the *wajib ul-araez* of Umri.

This is the evidence afforded by the *wajib-ul-araez* of the villages which were owned and possessed by the members of the family. The effect of the evidence afforded by them will be discussed later.

The appellants rely upon what they assert are three instances of property having devolved in the family according to the terms of the alleged custom. The first of these alleged instances taken in chronological order is in respect of the property of Ranjit Singh, the son of Dariyao Singh who died at a date which it is difficult to settle but which was at the earliest about 1877. There is some evidence that when Ranjit Singh died $\frac{1}{3}$rd of the property left by him went to the Madho Singh branch, $\frac{1}{3}$rd to the Bhup Singh branch and $\frac{1}{3}$rd to the Kandhai Singh's branch. The evidence on the subject is not very clear.

The second instance refers to the devolution of the property of Mankoa the widow of Ganga Bakhsh. She took possession of her husband's property on his death, and died herself in 1883. It is shown by Exs. 4 and 4-B that on her death Hardeo Bakhsh succeeded to half the property of Ganga Bakhsh. Ajudhia Singh and his two nephews Kedar Singh and Khanjan Singh succeeded to $\frac{1}{4}$th of the property, Kandhai Singh's son, Madho Singh's sons and Bhup Singh's grandsons succeeded to $\frac{1}{4}$th of the property. Muna Kuar widow of Kalka Bakhsh Singh was given a small share for maintenance. The latter persons (excluding Muna Kuar) on the 11th December 1885 transferred by a sale-deed (Ex. 10) the interests which they had obtained to Hardeo Bakhsh. When Muna Kuar died it was agreed among the survivors (Ex. 11) that her property should be divided amongst them There is further evidence upon this point in Ex. 2 that when *Musammat* Mankoa the widow of Ganga Bakhsh before her death executed a sale-deed on the 18th October, 1882, (Ex. 2) she obtained the attestation of all her male relatives. There is further evidence of a statement made by Khanjan Singh (Ex. 3) sometime in 1902, in which he stated. "We are all the heirs of the said Thakurain." This concludes the evidence on the second alleged instance.

The third alleged instance is in respect of the property of Kalka Bakhsh Singh which after his death was in possession of *Musammat* Muna Kuar, who died on the 31st May, 1894. This lady is referred to in some of the papers as Mankoa but there is no doubt as to who she is as she was the widow of Kalka Bakhsh. It has already been stated, how that portion of the property of Ganga Bakhsh, which she received after his death, devolved after her death. But the evidence as to the devolution of her husband's property which was held by her till her death is not so clear. This much is clear, however, that the lady had sold some of her husband's property to the Raja of Oel and after her death Ajudhia Singh and Khanjan Singh instituted a suit to set aside that sale. The suit was decided on the 10th April, 1901. The judgment is Ex. A-87. It was decreed in favour of the plaintiffs, the sale being set aside. This decision was upheld on appeal by the Court of the Judicial Commissioner on the 29th May, 1903 (judgment Ex. A-88) and affirmed by their Lordships of the Judicial Committee on the 7th February, 1907 (judgment Ex. A-89) reported as *Deputy Commissioner of Kheri* v. *Khanjan Singh* (1). After the decision of the Indian Courts in favour of the plaintiffs but before the decision of their Lordships of the Privy Council, Ganesh Singh and others instituted a suit for their share in the property. The plaint is dated 5th November 1904 (Ex. A-93 and Ex. A-113). The dispute was referred to arbitration and decided on the 14th May 1905 (decision Ex. A-94). Under the arbitrator's decision a division of the property was made amongst all the parties. These are the instances affecting the family of the parties.

We next come to the alleged proof of the custom in families of the same tribe unconnected with the families of the parties. The learned Counsel for the appellants did not in his argument lay stress upon all the instances which had been put forward in the trial Court. We were referred in this

(1) 29 A. 331; 5 C. L. J. 344; 11 C. W. N. 474; 4 A. L. J. 232; 2 M. L. T. 145; 17 M. L. J. 233; 9 Bom. L. R. 591; 10 O. C. 117; 34 I. A. 72 (P. C.).

portion of the agrument to the *wajib-ul-araez* of a large number of villages held by Ajit Mali Gaur Rajputs in the Sitapur District. These are the *wajib-ul-araez* to which we were particularly referred:

Madnapur	Ex. A-24
Sarna	Ex. A-101
Sareli	Ex. A-100
Dhannanpur	Ex. A-99
Bhogipur	Ex. A-41
Para	Ex. A-65
Jharia	Ex. A-105
Parewa	Ex. A-20
Bahadurpur	Ex. A-109
Kochalia	Ex. A-38
Pakhanianpur	Ex. A-39
Keshopur	Ex. A-22
Tihar	Ex. A-23
Purai Raipur	Ex. A-33
Harni	Ex. A-34
Nawa Mahmudpur	Ex. A-48
Dharnag	Ex. A-49
Gondwa	Ex. A-73
Ramnagar	Ex. A-43
Hathia	Ex. A-44.

The rule of succession laid down in these *wajib-ul-araez* is for the most part much the same as the rule of succession laid down in the Umri *wajib-ul-araez*, and there is nothing in them which need be quoted in this part of the judgment. It is sufficient to say here that not in a single one of these *wajib-ul-araez* is there any recital of such a custom as the custom set forth by the appellants.

We shall now take in order the 26 instances upon which the learned Counsel for the appellants lays stress. He did not refer to the remainder. The first of these is what the learned Subordinate Judge called the 4th instance and refers to the devolution of the property of Zalim Singh upon the death of his widow Muna Kuar. She died about 1893. The next instance (which the learned Subordinate Judge called the 5th instance) is in respect of the property of a certain Dalthamman Singh in the same village of Madnapur upon the death of his widow Narain Kuar who died about 1917. The third instance (which the learned Subordinate Judge called the 6th instance) is in respect of the property of a certain Kandhai Singh of Baseti which devolved after the death of his widow *Musammat* Bhagwana. The fourth instance (which the learned Subordinate Judge called the 7th instance), is in respect of the property of a certain Subha Singh of Pasaika who died about 1893. The next instance (which the learned Subordinate Judge called the 8th instance) is in respect of the property of a certain Ajudhia Singh of Kamaria. The next instance (which the learned Subordinate Judge called the 9th instance) is in respect of devolution of the property of Kesri Singh of Jharia and Para on the death of his widow. The next two instances (which the learned Subordinate Judge called the 10th and 11th instances) are also from the villages Jharia and Para. The next instance (which the learned Subordinate Judge called the 12th instance) is in respect of the devolution of the property of Bahadur Singh of Parewa. The next three instances (which the learned Subordinate Judge called the 13, 14 and 15th instances) are from the village Tika, Bahadurpur. The next two instances (which the learned Subordinate Judge called the 18th and 19th instances) are from the village Barchhata. The next instance (which the learned Subordinate Judge called the 20th instance) is also from the village Barchhata. The next two instances (which the learned Subordinate Judge called the 21st and 22nd instances) are from the village Keshopur. The next instance (which the learned Subordinate Judge called the 23rd instance) is from the village of Parai Raipur. The next three instances which the learned Subordinate Judge called the 26th, 27th and 28th instances) are from the village Nawa Mahmudpur. The next instance (which the learned Subordinate Judge called the 32nd instance) is from the village Narsohia. The next instance (which the learned Subordinate Judge called the 35th instance) is from the village Ramnagar. The next instances (which the learned Subordinate Judge called the 40th and 41st instances) are from the village Hathia, and the last instance (which the learned Subordinate Judge called the 42nd instance) is from the village Ramuapur. The learned Counsel did not press any other instances mentioned in the learned Subordinate Judge's judgment.

We shall first consider the value of the evidence adduced by the plaintiffs to establish that the custom in question exists in their own family. Their family is a family possessing considerable landed property. It is a family with a history of its own, as is clear from the *wajib-ul-araez* of the villages possessed by its members. In

Ex. A-3 the *wajib-ul-arz* of the village of Mahanandpur there is a statement that that village was captured about the year 1770 by Mehrban Singh and the other sons of Bakhat Singh. In Ex A-11 the *wajib-ul-arz* of Mumtazpur, there is a reference to the ancestors of the family having in the period directly after the death of the Emperor Aurangzeb carved out their estate by taking possession, wherever they found it possible to subjugate. The whole of these *wajib-ul-araez* show that the family of Bakhat Singh, to which the parties belong, has an individual history, and would not necessarily follow the same principle of succession as other families of Ajit Mali Gaur Rajputs in the Sitapur District. It is clear from the quotations, which we have already given from the relevant portions of the *wajib-ul-araez* affecting succession in the family, that at the time when those *wajib-ul-araez* were prepared about 1870 or 1871 the members of the family had clear views as to what the rules of succession were in their family. It is asserted every where by them that in contravention of the ordinary Hindu Law daughters and daughters' sons have no right of inheritance in their family. There is a custom restraining adoption. There are other customs. But it is to be noted, that although these *wajib-ul-araez* lay down rules as to succession and as to the rights of widows which in many ways differ from the rules of the Mitakshara Law upon the subject they do not contain a suggestion that when a branch becomes extinct (whether the last member has or has not left a widow who will obtain a widow's estate) the succession is to be otherwise than the succession of the Mitakshara Law, or in particular, that there is to be such a special custom that set up by the appellants, whereby the property of the last member of the extinct branch is to be divided amongst the other branches, each branch obtaining an equal share irrespective of the degree of nearness to the deceased. The *waijb-ul-araez* either state that after the widow's death the nearest male descendant of her husband's family is to succeed, or are silent on the subject, and in these circumstances there is cumulative evidence, not only contained in what the *waijb ul-araez* state but also in what they do not state, which goes to disprove the existence of such a custom. The value of entries in the *wajib-ul-araez* was formerly the subject of much discussion in many cases in Oudh. But there is now an authoritative pronouncement of their Lordships of the Judicial Committee which, in our opinion, must be considered as a guide in awarding weight to the entries in these documents. In *Balgobind* v. *Badri Prasad* (2) which was an appeal in a suit from Oudh, their Lordships at page 201* have said: "Settlement Officers in recording customs in *wajib-ul-araez* have to perform duties which the Government orders them to perform.

"One of these duties was to record customs as the Settlement Officer found them and not as he might think they ought to be. When it is not shown by reliable evidence that the Settlement Officer neglected to perform his duty or was misled in recording a custom, and it does not appear that the statement of the custom is ambiguous, the record in a *wajib-ul-arz* of a custom is most valuable evidence of the custom, much more reliable evidence than subsequent oral evidence given after a dispute as to the custom has arisen.

"There was no evidence to prove or even to suggest that the Settlement Officer in stating the custom as he did in the *wajib-ul-arz* had in any way neglected his duty in ascertaining what the custom was, or was misled as to the custom; nor was there any evidence given in this suit in denial of or at variance with the custom.

"Their Lordships find that the custom excluding daughters and their issue from inheritance was proved."

Now here it is clear from the *waijb-ul-araez* themselves, that the Settlement Officer took trouble to ascertain the opinions of the leading members of the family, as to what the customs of succession were. He recorded certain definite customs of succession, and in most instances recorded what should be the succession on the death of a widow. In this record it is made clear, that such succession is to be by the rules of the Mitakshara, and that there is no special custom in contravention of the rules of the Mitakshara Law. In these circumstances it would require an overwhelming amount of evidence to establish the existence of such a custom in face of the entries in the *wajib-ul araez* There is oral evidence, but

(2) 74 Ind. Cas 449; 50 I. A. 196; 21 A. L. J 578; A. I. R. 1923 P. C. 70; 9 O. & A. L. R. 581; 26 O. C. 217; 45 M. L. J. 289; 45 A. 413; 38 C. L. J. 302; (1923) M. W. N. 799; 33 M. L. T. 317; 10 O. L. J. 368; 29 C. W. N. 465 (P. C.)

*Page of 50 I. A.—[*Ed.*]

we agree with the learned Subordinate Judge that the oral evidence is of no value. There is no evidence of the existence of such a custom in the family ever having been affirmed in the judicial decision. There are three instances put forward and three instances only, and all these instances are stated to have taken place after the *wajib-ul-araez* had been prepared. The evidence in support of these instances is not in itself of weight in any individual case. The learned Subordinate Judge has discussed it at length and carefully. We take the first instance. If Ranjit Singh predeceased Narpat Singh, the circumstance that Ranjit Singh's property was divided into three equal shares, each of which went to each branch, would afford no evidence of a devolution contrary to the Mitakshara Law, for Jaskaran Singh who succeeded to $\frac{1}{3}$rd, Narpat Singh who succeeded to $\frac{1}{3}$rd, and the sons of Madho Singh who succeeded to $\frac{1}{3}$rd were all in the same degree from the common ancestor. It was for the appellants to prove their case affirmatively. The evidence as to whether Narpat Singh did or did not predecease Ranjit Singh was vague to a degree. We consider that the learned Subordinate Judge rightly laid considerable stress on the fact that Subha Singh plaintiff No. 2 who was the son of Narpat Singh deposed at o. p. 10 that Ranjit Singh had died in 1877 or 1878. After consideration we agree with the conclusion of the learned Subordinate Judge, that it is not established that the property of Ranjit Singh devolved after his death according to a rule of succession other than the rule of succession known to the Mitakshara Law.

We come to the second instance. It certainly appears that on the death of *Musammat* Mankoa the widow of Ganga Bakhsh, the Kewal Singh branch received $\frac{1}{2}$ of the property and the Mehrban Singh branch received $\frac{1}{2}$ of the property but it is to be noted that in no circumstances would Hardeo Bakhsh have received more than $\frac{1}{2}$. He was entitled to $\frac{1}{2}$ by succession under the Mitakshara Law. The remaining moiety should have gone to Ajudhia Singh, Bhawani Singh then being dead. There is evidence which goes far to explain, how Ajudhia Singh obtained less than what he should have obtained and how other members of Mehrban Singh's branch obtained more. Rustam Singh stated at o. p 7 that Ajudhia Singh was a very simple man and always went by what Hardeo Bakhsh told him. This statement was to a certain extent supported by plaintiff No. 2 Subha Singh under cross-examination for he stated at page 42 that at the time the advice of Hardeo Bakhsh and Ajudhia Singh used to be respected and that Ajudhia Singh was older than Hardeo Bakhsh. We do not accept the suggestion that the family was joint at the time. It appears to us that the family was separate, but we do not consider that there is anything in the instance which would go to show that the distribution, which gave Hardeo Bakhsh Singh his full share under the Mitakshara and Ajudhia Singh something less, was anything more than an arrangement which Hardeo Bakhsh thought just and fit, and we do not believe the evidence, which is to the effect that it was to carry out an old custom of the family. The vague description of the parties as heirs in no way establishes the existence of such a custom.

We now come to the third instance, and we are of opinion that the evidence here is far from supporting the existence of a custom. The most important part of the evidence upon this point is contained in the proceedings in the suit brought by Ajudhia Singh and Khanjan Singh, to set aside the deed of sale executed by the widow of Kalka Bakhsh. The judgment of the Subordinate Judge in that suit (Ex. A-1 87) shows that Ajudhia Singh instituted the suit as the nearest reversioner joining as plaintiff the widow of his deceased brother Bhawani Din and also joining Khanjan Singh, on the allegation that he was joint with him. Upon Ajudhia Singh's death Rustam Singh and Parwan Singh his sons were substituted as plaintiffs. The plaint clearly shows that Ajudhia Singh claimed possession as nearest reversioner. There was no suggestion made that there was a custom under which the estate had descended to all branches. The suit was brought clearly under the Mitakshara Law. The defendant contended that the plaintiffs were not the nearest reversioners. The Judge appears to have decided that Ajudhia Singh and Kalka Bakhsh formed the members of a joint Hindu family, but decided further in the alternative that if there had been separation Ajudhia Singh was the nearest reversioner. The decision turned very largely upon the question whether the widow of Kalka Bakhsh had a right to alienate the property, and the Judicial Commissioner's

Court, finding that she had no right to alienate the property, dismissed the appeal. In appeal it was again argued that Ajudhia Singh was not the nearest reversioner. It was again decided that he was the nearest reversioner (Ex. A-88). When the appeal was decided by their Lordships of the Judicial Committee (Ex. A-89) they stated in their judgment: "Man Kuar died on the 31st May, 1894, whereupon the estate of her husband passed to his then next male heir Ajudhia Singh and on the 21st February 1899 Ajudhia Singh (with another who need not be further noticed) instituted the present suit." In this appeal the appellants apparently did not press the point that the lady was entitled to transfer the property in absence of legal necessity and the appeal was only argued upon the ground that legal necessity existed. It is clear that in this suit Ajudhia Singh put himself forward as entitled to succeed on the ground that he was the nearest reversioner to Kalka Bakhsh under the Mitakshara Law. Now it is true that after this suit had been decided other members of the family instituted the second suit of which the plaint is Ex. A-93 and here for the first time we find a reference to the custom which is now alleged. In that plaint it was stated that the custom prevailing in the family of the parties is this that after the death of the original proprietor and his widow in the absence of male issue the property left by him is divided in equal shares among the surviving members of the family according to the degree of relationship and this is the custom generally prevailing among the Thakurs of the Gaur community. The arbitrators, however, did not touch the point, and apparently they were not asked to do so. In their decision Ex. A-94 they say: "We arbitrators in view of our powers given in the agreement, do not make any inquiry about custom" and continued that the reason why they were giving a certain portion of the property to the plaintiffs was because the plaintiffs in the suit before them had assisted the plaintiffs in the previous suit in conducting the litigation. Subha Singh plaintiff No. 2 at o. p. 34 admits that under this award he received about 1/10th of what he claimed under the custom.

There was another suit of 1907, the plaint in which is Ex. A-90. In this suit Khanjan Singh, Kedar Singh, Parwan Singh and Rustam Singh sued for a declaration that a transfer made by Hardeo Bakhsh's widow Umrai Kuar had been made without authority. There is no reference to the custom in that plaint and the plaintiffs sued as reversioners under the Mitakshara Law. The lady's written statement is Ex. A-91. In this she accepted that the inheritance would be by the Mitakshara Law but asserted that the plaintiffs were not the sole reversioners. The suit was decreed by judgment of the 21st October, 1907, (Ex. A-92) and it was decreed in favour of the plaintiffs as reversioners. As we read the evidence on this point, so far from establishing that there was such a custom as that alleged, it goes to show that there was no such custom. In *Chandika Bakhsh* v. *Muna Kunwar* (3) which is a decision of their Lordships of the Judicial Committee in reference to an almost similar allegation of custom which was set up by Ahban Thakurs in the Sitapur District their Lordships say at page 280*:

"In support of the appellant's claim there was in evidence a judgment which was not much to the point, some oral testimony which was anything but satisfactory, certain *wajib-ul araez* which on examination are found to prove nothing, and 18 instances of succession which were put forward as demonstrating the existence of the alleged custom. The Judge of first instance considered these instances conclusive. The Judicial Commissioner who delivered the judgment of the Court examined them in detail. He found that four had not been established, that ten must be regarded as doubtful, that two were not necessarily true examples of the alleged custom, and that remaining two might be taken as proved."

They continued later:

"The result is that in support of the alleged custom four instances at most can be adduced, and those of a comparatively modern date, and that there is no other evidence. It is obvious that a family custom in derogation of the ordinary law cannot be supported on so slender a foundation." Here the evidence is even weaker. The *wajib-ul-araez* not only prove nothing to support the alleged custom but actually disprove the existence of such a custom. The oral testimony is of no value at all. There are only three instances produced from the family. The evidence has failed upon the first instance. Upon the second

(3) 24 A. 273; 29 I. A. 70; 6 C. W. N. 425; 4 Bom. L. R. 376; 8 Sar. P. C. J. 233 (P. C.).

*Page of 24 A.—[*Ed.*]

instance our conclusion is that the arrangement arrived at was a family arrangement (irrespective of any allegations of custom) which was obtained owing to the personality of Hardeo Bakhsh Singh. The third instance actually goes to disprove the existence of the alleged custom. Upon this evidence we can arrive at an affirmative conclusion that there was no such custom in the appellants' family.

This being the case little advantage will be gained from a close scrutiny of the instances produced by the plaintiffs of some such custom, as the custom which they alleged, having been given effect to amongst families of the Ajit Mali Gaur Rajputs of the Sitapur District, with whom they are not actually connected except by the common tie of ancestry from Ajit Mal. We consider, however, that the arguments of the learned Counsel for the appellants on this part of the appeal deserve more than a summary rejection. We have to note in the first place that we are not satisfied that there is such a cohesion among these separate families as would justify the conclusion that there is anything of the nature of a tribal custom which would affect families other than the family having a particular custom. We do not find that there is such an allegiance to a common head or to common rules of life amongst these Ajit Mali Gaur Rajputs as would provide the foundation for such a tribal custom. Our view is based largely upon an examination of the *wajib-ul-araez* themselves. There is no uniformity amongst them. The *wajib-ul-arz* of Madnapur (Ex. A-24) while stating that daughter and daughters' sons are excluded from inheritance (it is clear from all the *wajib-ul-araez* that the families of these Ajit Mali Thakurs do exclude daughters and daughters' sons from inheritance) states that after the death of a widow the share devolves on the rightful heir. Most of these *wajib-ul araez* lay down rules similar to the rules laid in the Umri *wajib-ul-arz*. The Pakhanianpur *wajib-ul-arz* (Ex. A-39) states that when a widow dies all the co-sharers who had joined shall divide the assets amongst themselves in equal shares, but this is not a custom that the inheritance is to go in equal shares to the branches. The Hathia *wajib-ul-arz* (Ex. A-44) lays down a very vague rule that after the widow's death the other deserving heirs shall become owners of her share.

The Madnapur *wajib-ul-arz* is directly against the alleged custom. The Pakhanianpur and Hathia *wajib-ul-araez* lay down a custom in derogation of the Hindu Law but it is not the custom which the appellants assert. The remaining 17 *wajib-ul-araez* lay down no rule on the subject in derogation of the ordinary law. There is no uniformity and no certainty. All this is against a tribal custom. In respect of the oral evidence produced it is sufficient to say that we agree with the learned Subordinate Judge in finding it most unsatisfactory. From the necessities of the case both oral, and documentary evidence upon these points would ordinarily be unsatisfactory, but that circumstance cannot assist the appellant. The documentary evidence is mainly to show that after a certain man's death his property devolved in certain instances in a manner which appears at first sight not to be the manner in which it would have devolved under the Mitakshara Law. This evidence, however, in no way states the existence of a custom, and leaves the reason for the devolution obscure. It is impossible, in our opinion, to find in favour of custom upon such materials. Further, none of the instances of such a peculiar devolution occurred until after the *wajib-ul-araez* had been prepared. There is no evidence of judicial decisions in support of such a custom and we find that on one occasion when the matter came before the Courts it was decided that no such custom existed. Exhibit A-96 is the decision of the District Judge of Sitapur in appeal dated 26th July, 1905, in which an attempt on the part of a Gaur Rajput to establish such a custom as is asserted now failed.

Even if it had been established (as it had not been established) that there were many instances of property having devolved amongst families of Ajit Mali Gaur Rajputs in the Sitapur District unconnected with the appellants' family under a rule of succession not compatible with the Mitakshara Law, not attributable to a private arrangement, and only compatible with the existence of such a custom as the appellants alleged, the circumstance would not have assisted the appellants under the view of the law which has been taken in the Judicial Commissioner's Court for many years and with which we are in accord. In *Parbati Kuar* v. *Rani Chan-*

drapal Kuar (4) a Bench of the Judicial Commissioner's Court laid down the principle affecting such a case as follows :—

"It was suggested that the defendants are not entitled to set up both a family custom and what has been called in this case a tribal custom and we were referred to two cases in support of this proposition : One was that of *Bhai Narindar Bahadur Singh* v. *Achal Ram* (5). In that case only a family custom was pleaded. The other was that of *Raja Rup Singh* v. *Rani Baisni* (6). All that that case shows is that instances of succession must be shown to have taken place in the family when a family custom is pleaded. These two cases do not support the contention advanced. There is no objection to a party pleading that a custom obtains both in a family and in the tribe to which that family belongs but he must, of course, prove that the custom is binding on the family whether he confines his evidence and plea to the family or not."

In this view of the law the appellants would fail even if a custom obtained in the tribe because they have not established that it is binding on the family and the evidence goes to show that it is not binding on the family. There have been other decisions of the Judicial Commissioner's Court but they do not carry the matter any further.

We have already quoted the decision in *Chandika Bakhsh* v. *Muna Kunwar* (3). There is an earlier decision of their Lordships of the Privy Council in *Thakur Horihar Baksh Singh* v. *Thakur Uman Parshad* (7) in which in a case which also came from the Sitapur District it was asserted that there was a custom prevalent among the Panwar Rajputs that if a branch of a family had become extinct the other branches would take the estate in equal shares. At page 306* their Lordships found against the existence of such a custom. It appears to us not unlikely that amongst certain Rajput families in the Sitapur District there has been of late years a tendency to create such a rule as the rule set up by the plaintiffs, and that in certain instances it may very well be that the principles underlying such a custom have been applied to the devolution of properties. This circumstance in no way shows that such a custom existed in any instances. The principles upon which such cases should be decided were laid down by their Lordships in the year 1872 in *Ramlakshmi Ammal* v. *Sivanantha Perumal Sethurayar* (8) and have been applied on subsequent occasions by their Lordships. Their Lordships at page 585* state:

"Their Lordships are fully sensible of the importance and justice of giving effect to long established usages, existing in particular Districts and families in India, but it is of the essence of special usages, modifying the ordinary law of succession that they should be ancient and invariable: and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends."

Upon these conclusions we dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

(4) 8 O. C. 94.

(5) 20 C. 649; 20 I. A. 77; 6 Sar. P. C. J. 310; 17 Ind. Jur. 319; Rafique & Jackson's P. C. No. 128; 10 Ind. Dec. (N. S.) 438 (P. C.).

(6) 7 A. 1; 11 I. A. 149; 4 Sar. P. C. J. 533; A. W. N. (1884) 246; 3 Ind. Dec. (N. S.) 902 (P. C.).

(7) 14 C. 296; 14 I. A. 7; 11 Ind. Jur. 196; 4 Sar. P. C. J. 766; Rafique & Jackson's P. C. No. 95; 7 Ind. Dec. (N. S.) 196 (P. C.).

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(8) 14 M. I. A. 570; 17 W. R. 552; 12 B. L. R. 396; 2 Suth. P. C. J. 603; 3 Sar. P. C. J. 108; 20 E. R. 698 (P. C.).

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ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 496 OF 1924.
CONNECTED WITH FIRST APPEAL No. 18 OF 1925.
June 18, 1926.

Present:—Mr. Justice Kanhaiya Lal and Mr. Justice Ashworth.

SKIPPERS & CO., LTD., CALCUTTA —PLAINTIFF—APPELLANT
versus
E. V. DAVID AND OTHERS— DEFENDANTS—RESPONDENTS.

C. P. C. (Act V of 1908), s. 80—Suit against Official Receiver—Notice, whether necessary—Vendor and purchaser—Sale of moveable and immoveable property—Lien for unpaid purchase-money, enforcement of—Moveable property, determination of.

A certain Company sold all its assets to a purchaser and the sale-deed covered not only the immoveable property and lessee rights of the Company but also the good-will and interest and book debts and the benefits of all contracts and engagements owing to or entered

into by the Company and the moveable plant furniture, trade machinery, stocks and all other accessories and all other goods of any kind whatsoever lying or to be found at the Company's business premises. There was a provision that the company shall have a lien and charge on all the immoveable and moveable property sold under the deed for securing payment of the balance of the purchase-money or any portion thereof that may remain unpaid or become due to the Company. The purchaser thereafter became an insolvent and a suit was brought on behalf of the Company against the Official Receiver who was in charge of the estate of the purchaser to recover the balance of the purchase-money by enforcing the lien against the moveable property of the purchaser. The Official Receiver did not deny the lien of the Company but was directed by the District Judge to resist the suit for the purpose of settling certain matters :

Held, (1) that no notice under s. 80 of the C. P. C., was under the circumstances of the case required to be given to the Official Receiver before the institution of the suit ;

(2) that the language of the sale-deed confined the charge against the immoveable and moveable property of the Company to such property as was sold by the Company to the purchaser and that the charge could not extend to any property subsequently acquired by the purchaser ; [p. 140, col. 2.]

(3) that for the purpose of the enforcement of the charge, however, all moveable property found at the premises sold by the Company must, in the particular circumstances of the case, be presumed to be property which had been comprised in the sale-deed, unless it was established by the defendant that any portion of such property had been acquired by the vendee subsequently to the sale. [p. 141, col. 1.]

First appeal from a decree of the Second Subordinate Judge, Cawnpore, dated the 2nd September, 1924.

Dr. *K. N. Katju*, for the Appellant.

Messrs. *P. L. Banerji* and *U. S. Bajpai*, for the Respondents.

JUDGMENT.—These cross-appeals arise out of a suit brought by Skippers & Co., Ltd., Calcutta (now in liquidation) through the liquidator William Duchatel Woellworth against Mr. E. V. David, Official Receiver, Cawnpore, Mr. Frank Skippers and one Jairam Das. Up to July 1922 Skippers & Co., Ltd., a Calcutta firm owned a business in Calcutta with a branch at Cawnpore. The Cawnpore branch was managed by Mr. Frank Skippers defendant No. 2. On the 6th of July, 1922, a sale-deed was drawn up whereby Skippers & Co., Ltd. sold the assets of the firm at Cawnpore to Mr. Frank Skippers. John Skippers and M. Skippers were made parties to the sale-deed as vendors, but this fact has not been considered of any importance in the present litigation. The sale-deed purported to convey the business at Cawnpore of Skippers & Co., Ltd., Calcutta, and was to include not only the branch known as the Civil Lines branch but also a branch known as the Cawnpore Motor Company situated on the Mall, Cawnpore. The sale was to cover also not only immoveable property and lessee rights but also "the good-will and interest and book debts and the benefits of all contracts and engagements owing to or entered into by the said Company's business at Cawnpore, and the moveable plant, furniture, trade machinery, stocks, cars and all other accessories and all other goods of any kind whatsoever now lying or to be found at the Company's business premises at Cawnpore except any goods sent on consignment sale account from Goodrich Tyre Agency Calcutta. There was a provision that the vendor Company "shall have a lien and charge on all the immoveable and moveable property sold as aforesaid for securing payment of the balance of the said purchase money or any monies that may remain unpaid or become due to the Company hereunder or otherwise which lien, and charge shall be subject only to a charge about to be created thereon in favour of the Imperial Bank of India or some other Bank, Company or person to secure an advance to the purchaser to the extent of rupees two lakhs and fifty thousand and the purchaser covenants further with the Company to execute and register a legal mortgage of the said property as and when required by the Company with full powers of sale and realisation and also not to create or allow any security or incumbrance (except as aforesaid) to rank in priority to or *pari passu* with the Company's rights hereunder." The price fixed was Rs. 4,39,800 of which Rs. 2,50,000 were paid down, and the balance was to be paid a year hence on the 6th of July, 1923. The deed was registered at the Sub-Registrar's office, Cawnpore, on the 30th October, 1922, and receipt of Rs. 2,50,000 acknowledged. There is an endorsement showing that the sale-deed was to be handed at the request of Mr. Frank Skippers, vendee to an officer of what was then known as the Tata Industrial Bank and is now known as the Central Bank of India, Limited. It is common ground that Mr. Frank Skippers in order to pay the Rs. 2,50,000 which were paid at the time of registration borrowed two lakhs of rupees from this Bank. He had raised Rs. 50,000 in some other way with which we are not concerned. It is also common ground that on the 30th of July

Frank Skippers applied to be made insolvent, and that Mr. E. V. David defendant No 1, the Official Receiver, was made *ad interim* Receiver of his property. The balance under the sale-deed became payable on the 6th of July, 1923.

The present suit is brought against the Official Receiver, Mr. Frank Skippers and one Jairam Das, who is said to have given a surety bond for the payment of the balance of the purchase price, and it asks for a decree for Rs. 1,90,673-9 with costs and interest by enforcement of the charge on the property. It also asks for a sale of all the property in the possession of the Official Receiver or Frank Skippers.

The suit was resisted by Mr. E. V. David Official Receiver mainly on the ground that he should have had notice under s. 80 of the C. P. C., and that the charge could not be enforced against the moveables in the possession of the firm at the date of the suit, and that the Central Bank which advanced Rs. 2,00,000 to Mr. Frank Skippers had a prior charge under the sale-deed against any property sold. Jairam Das defendant No. 3 admitted that he was liable, but only for such balance as might be due after proceeding against the moveables, etc., under the charge set up by the plaintiff, which charge this defendant admitted as claimed.

The Subordinate Judge of Cawnpore decided as a preliminary point the question of notice. He held that the Official Receiver was a Government servant but that no notice was required in a case of this kind, as the Official Receiver was only impleaded as being in possession of the assets, and not for any act done by him in his official capacity. He then decided that the charge only extended to moveables which formed a part of the property sold by the plaintiff firm on the 6th July, 1922, and did not extend to subsequently acquired moveables. He rejected the claim of the Central Bank of India, Limited, to any prior charge on the assets of Mr. Frank Skippers. Accordingly he gave a decree against the immoveable property in the hands of defendant No. 1, defendant No. 2 and against such moveables in their hands as were in existence on the business premises at the date of the sale by the plaintiff firm. He directed that a commission would issue to determine what these moveables were, and directed that the list of such moveables as found by the Commissioner will be deemed to be a part of the decree.

A Commissioner was appointed, but, as might be expected, he was never able to ascertain what were the moveables on the premises when the sale took place, and what were the moveables on the premises at the date of his holding his inquiry that had been subsequently added. The successor of the Subordinate Judge not being in a position to carry out his predecessor's direction for the addition to the decree of a list of moveable property against which the decree was to take effect inserted in the decree a direction that no moveable property would be proceeded against unless and until the plaintiff in the course of the execution proceedings showed that the moveable property against which he asked for execution had been in existence at the date of the sale.

Against this decree the plaintiff has appealed on the ground that the charge covered all moveable property and stock-in-trade that might be found on the premises at any date up to the satisfaction of the decree. The Official Receiver has filed a cross-appeal which raises certain points. One is that the lower Court was wrong, in refusing, on the ground that the Central Bank, Limited, was no party to the suit, to declare the existence of a prior charge in favour of the Bank. Another is that, as the plaintiff failed to show the moveables to which the charge extended, the decree should have excluded any relief against the moveables. A third is that the suit was premature owing to want of notice to him as Official Receiver under s. 80 of the C. P. C. There are other points raised in the petition of appeal but they have not been pressed.

As to the plaintiff's appeal we are of the opinion that the language of the sale-deed clearly confined the charge against the immoveable and moveable property to such property as was sold by the plaintiff firm. There was no provision as to property subsequently acquired by the vendee. It has been argued for the plaintiff firm that notwithstanding the use of the word "all the immoveable and moveable property *sold*" in para. 6 of the sale deed, the circumstances of the case along with certain omissions in the sale-deed clearly indicated that it was the intention of the parties to the sale-deed that the charge should operate against all moveables whether in exist-

ence on the premises at the date of sale, or whether subsequently acquired before the date of enforcement of the charge. It is pointed out that no list of the moveables sold was attached to the sale-deed, and that the sale-deed did not contain any condition prohibiting disposal of a property pending completion of the purchase price. Again it is pointed out that what was being sold was a retail business as a going concern, and that the parties must have been aware that the stock-in-trade would change from day to day, so that it would be absurd to suppose that the charge was to be confined to the stock in existence at the date of sale, inasmuch as the charge would not come into effect until a year later. There is some force in these contentions, but at the most they only amount to saying that the plaintiff vendor would have been well advised to require a charge different from the one actually imposed by the sale deed. We do not consider that any circumstance can override the express language of the deed which clearly is not sufficient to include property not on the premises at the time the deed was executed. A case precisely on all fours with this case is *Tapfield* v. *Hillman* (1). This case was relied upon in a previous decision of this Court, reported as *Anderson* v. *Bank of Upper India, Limited* (2). It is true that in *Tapfield* v. *Hillman* (1) what was being sold was an inn with its furniture and stock-in-trade. The furniture of an inn might not be so liable to be displacement and substitution as the moveables of a motor shop, but wines, spirit and beer are as subject to renewal as motor spares, etc. In *Tapfield* v. *Hillman* (1) Justice Coltman remarked that it was not improbable that the parties intended that the security of the mortgagees should extend to the stock and effects brought upon the premises from time to time to re-place that which was disposed of and consumed by the plaintiff in the course of his business. But he added that they could only look to the language of the deed which clearly was not sufficient to include property not on the premises. In that case the deed spoke of "the furniture scattered in, about, upon belonging to the inn." These words are less decisive as restricting the charge to property existing at the date of the instrument than the words in the present sale-deed are, which speak of the charge operating only on property sold. At the same time we think that under the circumstances of this case the lower Court should have held the property actually found on the premises at the time of the Commissioner's inquiry to be the property actually sold, in the absence of proof to the contrary by the defendants Nos. 1 and 2. The vendee Frank Skippers had been Manager of the vendors' firm. Accordingly both before and after the sale he was the person responsible for the books of the business at Cawnpore. The burden of proving what property was in existence at the date of the sale and what was subsequently added was on him. It might be taken as extremely probable that he added very little, if anything, to the stock after the sale. He was hard pressed to raise the balance of the sale money, and it is clear that he would only order any new stock when it was urgently needed. We have little doubt that the stock found on the premises by the Receiver was the balance of the stock sold. In the circumstances of the case we consider that the lower Court should have given the plaintiff a decree against all the assets in the hands of the Receiver. The Receiver was allowed to convert these assets. The decree should, therefore, have been against the assets whether in the form of stocks or cash realised.

As to the cross-appeal it has been strenuously contended by the Counsel for the defendant-respondent that para. 6 of the sale-deed should be construed as effecting a prior charge in favour of the Bank notwithstanding that no subsequent formal document was executed between Frank Skippers and the Bank creating a charge in favour of the Bank. The equitable principle is invoked that what ought to have been done by Frank Skippers should be regarded as having been done, and that the mere omission or mistake of the Bank to get a contract of charge from Frank Skippers may be ignored, as the plaintiff vendor clearly contemplated such a charge being created. In support of the argument it was urged that the sale-deed was shown to have been delivered by the Sub-Registrar after registration to the Bank, and this is said to indicate the intention not only of Frank Skippers but also of the plaintiff vendor who was present that a

(1) (1843) 134 E. R. 883; 6 Man. & G. 245; 6 Scott (N. R.) 967; 12 L. J. C. P. 311; 7 Jur. 771.
(2) 29 Ind. Cas. 984; 13 A. L. J. 489; 37 A. 390.

prior charge should exist in favour of the Bank. Again we are referred to an application by Mr. Frank Skippers to the Bank for the advance of the two lakhs of rupees in which he offered as security not only a joint promissory note by himself and a rich Indian gentleman Pandit Balbhadar Prasad Tewari but also offered a lien on all buildings, stock and outstandings at the mills store and motor department. There are thus three pieces of evidence to be considered in respect of this plea. As to para. 6 of the sale-deed, it is only evidence that the parties to the sale-deed contemplated a prior charge being offered to the Bank as security for two lakhs to be advanced by the Bank. As regards the application to the Tata Bank for the loan, this is no evidence that the Bank accepted the offer of a charge over the property. As regards the endorsement on the registered sale-deed that it was to be handed over at the request of Mr. Frank Skippers to the Bank, this endorsement loses all force as evidence owing to the fact that the sale-deed was not produced by the Bank but by the plaintiff. Whatever, therefore, happened on the day of registration it is clear that the plaintiff obtained the sale-deed from the Bank. The Bank is not likely to have handed over the sale-deed to the plaintiff firm if it really understood that a prior charge had been created in its favour. We are unable to hold that this is a case where the charge merely fails by some inadvertent act on the part of the persons concerned which equity might regard as being fulfilled. The probability is that the Bank did not accept the offer of a charge on the moveables in view of the fact that it had got a promissory note by so substantial a person as Pandit Balbhadar Prasad Tewari.

As to the objection that no reference should have been made in the decree to the moveables as the plaintiff had failed to show on what moveables the charge operated, the objection ceases to be tenable by reason of our decision that it must be held that all moveables on the premises at the date of the preparation of an inventory by the Receiver and entered in his list were moveables sold by the plaintiff firm and subject to the charge. As regards the objection based on the language of s. 80 of the C. P. C, we are of the opinion that it is not a valid objection. There has been much difference of opinion shown by the High Courts of India as to the object of s. 80. The Bombay High Court seems generally to have taken the view that s. 80 applies only to suits based on tort. Reference may be made to *Rajmal Manickchand Marwadi* v. *Hanmant Anyaba* (3), *Cecil Grey* v. *Contonment Committee of Poona* (4) and *Damodar Jagjivan* v. *Govindji Jivabhai* (5). On the other hand, the Calcutta High Court has extended the section to actions arising out of a breach of contract, see *Ratan Chand Dharam Chand* v. *Secretary of State of India* (6). Taking the language of the section as it stands along with the definition of act in the General Clauses Act where an act will include illegal omission, that is to say an omission which gives rise to a civil action, it is difficult to place any restriction on the section which would appear to require notice in all suits against any person for anything done or omitted by him in his official capacity. There is a decision of this Court to which one of us was a party which has points of similarity with the present case [*Murari Lal* v. *David* (7)]. It was held that no suit can be instituted against an Official Receiver in respect of any act done by him in his capacity as such a public officer without a previous notice prescribed by the C. P. C. The relief asked in that suit was one for a declaration of title by the plaintiff in some property which the Official Receiver had advertised for sale in the interests of the unsecured creditors. The peculiarity of the present case is that the cause of action stated in the plaint is said to be the failure of the defendants, that is to say, the Official Receiver, the insolvent and the surety in respect of the debt due to the plaintiff firm to pay the plaintiff firm the balance of the purchase-money of the business in question. Now the suit is really one for establishing and realising a charge over property moveable and immoveable. The Official Receiver did not deny the right of the plaintiff to maintain a charge. He was directed by the District Judge to resist the suit for the purpose of settling certain matters. It does not appear that any act or omission can be predicated on the part of the Official Receiver as one in respect of

(3) 20 B. 697; 10 Ind. Dec. (N. S.) 1033.
(4) 7 Ind. Cas. 679; 34 B. 583; 12 Bom. L. R. 615.
(5) 73 Ind. Cas. 240; 25 Bom. L. R. 378; A. I. R. 1923 Bom. 392.
(6) 27 Ind. Cas. 232; 18 C. W. N. 1340.
(7) 84 Ind. Cas. 739; 22 A. L. J. 1116; L. R. 6 A. 106 Civ.; A. I. R. 1925 All. 241; 47 A. 291.

which the suit is being brought. Section 28 (6) of the Provincial Insolvency Act V of 1920 says, "the making of an order of adjudication shall not affect the power of any secured creditor to realise or otherwise deal with his security, in the same manner as he would have been entitled to realise or deal with it if this section had not been passed." From this it would appear that the plaintiff was not bound to make the Official Receiver a party and that he is not alleging any act or omission on the part of the Official Receiver as one in respect of which he is suing. It would appear that the plaintiff must have recourse to the Court to get the property sold, and that nothing that the Official Receiver has done up to the date of suit has stood in his way of doing this. The Official Receiver is joined as a party in whom the property vests for the time being and not as the party who made a contract or was guilty of any breach of it. For the above reasons we think it would be unsafe in this case to hold that notice under s. 80 was required.

Accordingly we dismiss Appeal No. 18 of 1925 with costs including fees on the higher scale in this Court. We allow Appeal No 496 of 1924 and direct that the charge shall be enforceable against the moveable property entered in the inventory prepared by the Official Receiver or the sale-proceeds thereof in his hands on the date of the decree of the Court below in addition to the immoveable property specified in the decree. The appellant in Appeal No. 496 of 1924 will get his costs in this Court from the contesting defendant-respondent including fees on the higher scale.

Z. K. *Appeal No. 18 of 1925 dismissed.*
Appeal No. 496 of 1924 allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1777 OF 1923.

August 6, 1926.

Present:—Mr. Justice Devadoss.

BALAJI SINGH—PLAINTIFF—APPELLANT

versus

CHAKKA GANGAMMA AND ANOTHER—DEFENDANTS—RESPONDENTS.

Transfer of Property (Amendment) Act (XXVII of 1926), s. 2—Attestation—Act, whether retrospective—Acknowledgment of signature, whether sufficient—C. P. C. (Act V of 1908), s. 103—Appeal, second—High Court, power of to record finding on questions of fact—Interpretation of Statutes—Retrospective operation.

The Transfer of Property (Amendment) Act of 1926 was passed in order to declare what the meaning of the word "attested" in s. 3 of the Transfer of Property Act is and not to alter the law. It only explains the expression "attested" and that explanation has to be inserted after the word "instrument" in s. 3 of the Transfer of Property Act. The Act is retrospective in its operation and applies also to pending actions. [p. 146, col. 2; p. 147, col. 1.]

By virtue of the Transfer of Property (Amendment) Act of 1926 an acknowledgment by the executant of a mortgage of his signature or mark to the document before the attesting witnesses is sufficient for the proper and valid execution of the mortgage document and it is not necessary that they should actually see the executant sign the document. [p. 147, col. 1.]

In the case of Indian enactments, the marginal notes are never the subject of discussion and they should not be held to control the clear meaning of the section or to show what the section means when the section is not clear. [p. 145, col. 2.]

The preamble and the title of an Act should be read together. [*ibid.*]

Legislative enactments have no retrospective effect unless explicitly stated to be so in the enactments themselves. [p. 144, col. 2.]

Amending Statutes should not be construed as having retrospective effect if they affect vested rights. [*ibid.*]

Statutes which are declaratory or explanatory are to be construed as having retrospective effect as they give an authoritative explanation of the words, phrases or clauses used in a Statute, and whenever the Statute has to be applied the explanation also should be applied. [*ibid.*]

No recital in a declaratory or amending Statute can render void that which has been declared by the Courts to have been done rightly under the law. [*ibid.*]

Statutes which affect mere procedure are retrospective in their nature. [*ibid.*]

Under s. 103, C. P. C., the High Court can in second appeal itself record a finding on a question of fact instead of sending the case down to the lower Appellate Court. [p. 147, col. 1.]

Second appeal against a decree of the Court of the Subordinate Judge, Bezwada, in A. S. No. 188 of 1922, preferred against that of the Court of the District Munsif, Bezwada, in O. S. No. 728 of 1921.

Mr. *P. Satyanarayana Rao*, for the Appellant.

Mr. *V. Suryanarayana*, for the Respondents.

JUDGMENT.—The only point in this second appeal is whether the execution of the mortgage-deed sued on, Ex. A, has been proved. The District Munsif held that it was validly executed and decreed the plaintiff's suit. The Subordinate Judge reversed the decree of the District Munsif and dismissed the plaintiff's suit on the ground that its execution was not properly proved. The plaintiff has preferred this second appeal.

The evidence of the two attesting witnesses is to the effect that they did not actually see the executant signing the document,

Plaintiff's witness No. 2 says: "I did not see the 2nd defendant sign Ex. A or the 1st defendant put her mark in it. It was written somewhere." Plaintiff's witness No. 3 says: "I was not present when Ex. A was written. The parties to it came to me and the defendants asked me to attest it saying they executed it." The judgment of the Subordinate Judge would be correct but for Act XXVII of 1926, for the law was that in order to prove the execution of a document the attesting witness should have actually seen the executant sign or put his mark to the document. Act XXVII of 1926 which received the assent of the Governor-General on the 25th of March, 1926, was passed in order to get rid of the interpretation put upon the word 'attestation' by the Courts.

Section 2 of the Act is as follows: "In s. 3 of the Transfer of Property Act, 1882, after the definition of the word 'instrument,' the following shall be inserted, namely: 'attested,' in relation to an instrument, means attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgment of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant, but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary."

Mr. Satyanarayana for the appellant contends that by virtue of the new Act the acknowledgment by the executant of his signature to the document before the attesting witnesses is sufficient for the proper execution of the document and it is not necessary that they should actually see the executant sign the document. If the attesting witness deposes that the executant acknowledged before him his signature or mark to the document and that he attested the document after receiving such acknowledgment, his evidence is sufficient to prove a valid execution. In this case there is such evidence. The question, therefore, is whether Act XXVII of 1926 applies to the present case. The contention of Mr. Suryanarayana for the respondents is that Act XXVII of 1926 is an amending Act and, therefore, it has no retrospective effect and should not be construed so as to affect vested rights and that the 1st defendant has already acquired a benefit by the document not being validly executed and he should not be deprived of it by a construction of the amending Statute which would affect his rights. A number of cases have been relied upon by both the appellant and the respondent. The following principles may be taken as established by the cases:—

1. Legislative enactments have no retrospective effect unless explicitly stated to be so in the enactments themselves.

2. Amending Statutes should not be construed as having retrospective effect if they affect vested rights.

3. Statutes which are declaratory or explanatory are to be construed as having retrospective effect as they give an authoritative explanation of the words, phrases or clauses used in a Statute, and whenever the Statute has to be applied the explanation also should be applied.

4. No recital in a declaratory or amending Statute can render void that which has been declared by the Courts to have been done rightly under the law.

5. Statutes which affect mere procedure are retrospective in their nature.

In *Attorney-General* v. *Theobald* (1) it was held that s. 11 of the Customs and Inland Revenue Act of 1889 was retrospective in effect. Section 11 was enacted in order to explain the expression "voluntary settlement" in s. 38 (c) of the Customs and Inland Revenue Act of 1881. Baron Pollock observed at page 559* :—

"The case of *Attorney General* v. *Marquis of Hertford* (2) in the Court of Exchequer is a strong authority that, if an Act is in its nature a declaratory Act, the argument that it must not be construed so as to take away previous rights is not applicable. The present case is, in my opinion, a stronger one in favour of the Crown. Here the earlier Act of 1881 provides what documents are to be stamped and what property is to be affected, describing it as 'any property passing under any past or future voluntary settlement.' These words 'voluntary settlement' having given rise to doubts, the Legisla-

(1) (1890) 24 Q. B. D. 557; 62 L. T. 768; 38 W. R. 527.

(2) (1849) 3 Ex. 670; 18 L. J. Ex. 332; 154 E. R. 1014.

*Page of (1890) 24 Q. B. D.—[*Ed.*]

ture in 1889 passed an Act which, in s. 11, sub-s. (1) provides that 'sub-s. (2) of s. 38 of the Act of 1881 is hereby amended as follows.' Now, although that section begins by using the words 'is hereby amended,' yet the material part is that which follows, in sub s. (1), 'the description of property marked (c) shall be construed as if the expression "voluntary settlement" included any trust.....in favour of a volunteer..... whether such deed or other instrument was made for valuable consideration or not as between the settlor and any other person.' Therefore the earlier Act must be read as having the meaning declared by the later Act. That seems to me to make this case perfectly clear."

In *Attorney General* v. *Pougett* (3) it was held that an Act of Parliament made to correct an error by omission in a former Statute of the same session, has relation back to the time when the first Act was passed. Even when mistakes in Legislative enactments are corrected by a later amending Act, the amending Act should be read as part of the Act which it was intended to correct. Though the Act is not called a declaratory or explanatory Act, if from the words used in the Act the Court can come to the conclusion that it is a declaratory or explanatory Act, retrospective effect will be given to such Act. This is clear from *Rex* v. *Inhabitants of Dursley* (4). Lord Tenterden, C. J., observed with regard to the amending Statute:

"I think we must understand the second section to be retrospective, because it would be useless unless it were so. The words that 'payment to the amount of 10*l*. shall be deemed sufficient for the purpose of gaining a settlement under the said recited Act' import that, as to the payment of rent, the Statute is declaratory. If the words had been 'it is hereby declared that payment, etc. shall be deemed sufficient', there could have been no doubt that the clause would be retrospective. Here the words are the same in effect."

Mr. Suryanarayana for the respondents strongly contends that the Act is an amending Act, and, therefore, it should not be held to have retrospective effect. No doubt the Act is called the Transfer of Property (Amendment) Act, and in the preamble it is stated "Whereas it is expedient to explain certain provisions of the Transfer of Property Act." The preamble and the title should be read together. From the whole of the Act it is quite clear that it is an explanatory Act and not an amending Act. He relies very strongly upon the observation of Lord Lindley, M. R., in *Fielden* v. *Morley Corporation* (5) quoted by Craies, in his book on Statute Law at page 176, and contends that the title of the Act should be taken into consideration in considering an Act. The observation is as follows:—

"I read the title advisedly, because now, and for some years past, the title of an Act of Parliament has been part of the Act. In old days it used not to be so, and in the old law books we were told not so to regard it; but now the title is an important part of the Act, and is so treated in both Houses of Parliament."

It is also urged by Mr. Suryanarayana that the marginal note should be considered in considering an Act. The marginal note here is "Amendment of s. 3, Act IV of 1882." Whatever may be the view with regard to certain Acts of Parliament, in the case of Indian enactments the marginal notes are never the subject of discussion and they should not be held to control the clear meaning of the section or to show what the section means when the section is not clear. Baggallay, L. J., observed in *Attorney General* v. *Great Eastern Ry., Co.* (6):

"I never knew an amendment set down or discussed upon the marginal note to a clause. The House of Commons never has anything to do with the amendment of the marginal note."

These remarks apply with great force to Indian enactments. The object of the Act as stated in the preamble is to explain certain provisions of the Transfer of Property Act. The Act itself is called "the Transfer of Property (Amendment) Act" because it is not usual to style an Act as a declaratory or explanatory Act. The contention that the title and the marginal note make the Act an amending Act cannot be accepted.

(3) (1816) 2 Price 381; 146 E. R. 130; 17 R. R. 531.
(4) (1832) 3 B. & Ad. 465; 110 E. R. 168; 1 L. J. M. C. 37.
(5) (1899) 1 Ch. 1; 67 L. J. Ch. 611; 47 W. R. 295; 79 L. T. 231; 14 T. L. R. 566.
(6) (1879) 11 Ch. D. 449; 48 L. J. Ch. 429; 40 L. T. 265; 27 W. R. 759.

The case of *Harding* v. *Commissioners of Stamps for Queensland* (7) does not help the respondent. In that case it was held that the Amendment Act of 1895, s. 2 was not retrospective in its operation. It was a fiscal enactment. Lord Hobhouse in delivering the judgment of the Privy Council observed :—

"The nature of the Act must be determined from its provisions. Now, the Act does not contain any words to show that it purports to construe the Act of 1892; it does purport to amend it; every other of its provisions is in language prospective, and in s. 2 itself the new rule is to take effect 'upon the issue of any grant of Probate', which is not fitting language to apply to estates for which Probate has already been granted. In fact, the language of the Act points, as their Lordships think, distinctly to future operations."

Mr. Suryanarayana relies upon *Gardner* v. *Lucas* (8) as supporting his contention. In that case it was held that under the Statute 1696, c. 15, certain formalities were necessary for the validity of certain agreements. By the 38th and 39th sections of the Conveyancing (Scotland) Act, 1874, several requirements in the previous Statute were dispensed with. It was held that the two sections were not retrospective and could not remedy the defects in a deed executed before 1874 which was void under the Act 1696, c. 5. Lord O'Hagan observed:

"Unless there is some declared intention of the Legislature—clear and unequivocal—or unless there are some circumstances rendering it inevitable that we should take the other view, we ought to presume that an Act is prospective and is not retrospective."

Lord Blackburn observed at page 603*:

"But where the effect would be to alter a transaction already entered into, where it would be to make that valid which was previously invalid—to make an instrument which had no effect at all, and from which the party was at liberty to depart as long as he pleased, binding—I think the *prima facie* construction of the Act is that it is not to be retrospective, and it would require strong reasons to show that is not the case."

In this case there is no question of the invalidity of the document. The document was executed. The only question is what is necessary to prove the execution of the document. It cannot be said that the document is invalid when it was executed. Before the Privy Council declared the law, execution could be proved by examining any of the attesting witnesses; it was not considered necessary that the attesting witness should have been actually present when the executant signed or put his mark to the document. The Act XXVII of 1926 was passed in order to declare what the meaning of the word "attested" is and not to alter the law.

It is next urged that the Act should not be applied to pending actions and reliance is placed upon *Hitchcock* v. *Way* (9). In that case the action was brought against an acceptor of a Bill of Exchange by a *bona fide* holder before the passing of Statute 5 and 6, Will. 4, c. 41. It was held that under the Statute, 9 Anne. c. 14, the defendant was entitled to non-suit if he proved the bill to have been given for a gaming consideration. Lord Denman, C. J., observed:

"The plaintiff argued that this enactment could only receive effect at the time of trial, and the Court was bound to act upon it at that period. And many cases were cited in which Acts of Parliament repealing and altering the law had been so construed. But they all turned on the peculiar wording of those Acts, which appeared to the Court to compel them to give the law an *ex post facto* operation. It is enough to say that we find no such words in the 5 and 6, Will. 4, c. 41, and are of opinion in general that the law as it existed when the action was commenced must decide the rights of the parties in the suit, unless the Legislature express a clear intention to vary the relation of litigant parties to each other."

This case has no application to the present case as Act XXVII of 1926 does not alter the law as it stood before it was enacted. It only explains the expression "attested" and that explanation has to be inserted after the word "instrument" in s. 3 of the Transfer of Property Act. When a phrase or word or expression in an enactment is explained by the Legislature, the Act has to be applied with the authoritative explanation, for the very object of the authoritative explanation is to enable the Court to understand the Act in the light of the explanation. It cannot, there-

(7) (1898) A. C. 769; 67 L. J. P. C. 144; 79 L. T. 42; 14 T. L. R. 488.

(8) (1878) 3 A. C. 582.

*Page of (1878) 3 A. C.—[*Ed.*]

(9) (1837) 6 Ad. & E. 943; 112 E. R. 360; 2 N. & P. 72; W. W. & D. 491; 6 L. J. K. B. 215; 45 R. R. 653.

fore, be said that this Act does not apply to pending actions. In Maxwell on the Interpretation of Statutes, at page 394, the law is stated as follows :—

"If a Statute is in its nature a declaratory Act, the argument that it must not be construed so as to take away previous rights is not applicable."

The observations of Pollock Baron in *Attorney-General* v. *Theobald* (1) are pertinent to this case.

"It certainly was considered in many cases that where a person had commenced an action he had a vested right, and that any subsequent Statute ought not to be construed as retro-active so as to alter that right. That is not an invariable rule, and it does not apply if the language of the Statute is clear and express. This appears from a good many authorities, especially those affecting questions of costs."

I hold as the law stands at present it is sufficient if the attesting witnesses prove that the executant admitted before them his signature to the document and they attested it after getting such admission or acknowledgment.

The next question is whether I should record a finding on the question of fact, or whether I should send it down for a finding to the lower Appellate Court. Seeing that the evidence is not voluminous and the statements of P. W. No. 2 and P. W. No. 3 are clear, I think no useful purpose will be served by sending the case down for a finding on the question whether the document has been validly executed or not. Section 103 of the C. P. C. is intended to cover cases of this kind. Plaintiff's witness No. 2 says: "The first defendant said that they executed it." Plaintiff's witness No. 3 says: "The parties to it came to me and the defendants asked me to attest it saying they executed it." It is urged by Mr. Suryanarayana that the evidence of these witnesses was considered untrue by the first Court and, therefore, they should not be relied on. Though the witnesses did not depose as expected of them, yet there is no reason to reject their evidence as totally false. Very often attestors are asked by the executants to attest the document after they have signed it. I see no reason to reject their evidence. I, therefore, find that the document has been proved to have been validly executed.

In the result, the appeal is allowed and the decree of the Subordinate Judge is set aside and the decree of the District Munsif restored with costs throughout.

V. N. V. *Appeal allowed.*

Z. K.

OUDH CHIEF COURT.

SECOND CIVIL APPEAL No. 310 OF 1926.

November 15, 1926.

Present :—Mr. Justice Hasan.

DEBI SAHAI AND OTHERS—DEFENDANTS—APPELLANTS

versus

NARAYAN SAHI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 83—Deposit, withdrawal of, effect of—Redemption—Mortgagee, whether liable for mesne profits.

A mortgagor made a deposit under s. 83 of the Transfer of Property Act and on the refusal of the mortgagee to accept the deposit instituted a suit for redemption of the mortgage. The suit was dismissed on a preliminary point and after the dismissal the mortgagor withdrew the deposit. The decree dismissing the suit was reversed on appeal and after remand the suit was decreed :

Held, that the mortgagor having withdrawn the deposit was not entitled to claim the benefit of the provisions of s. 83 of the Transfer of Property Act and the mortgagee was not, therefore, liable for the mesne profits from the date of the deposit.

Appeal against a decree of the District Judge, Hardoi, dated the 14th May, 1926, reversing that of the Subordinate Judge, Hardoi, dated the 8th August, 1923.

Mr. *Hakimuddin*, for the Appellants.

Mr. *S. M. Ahmad*, for the Respondents.

JUDGMENT.—This is the mortgagees' appeal in a claim for redemption. Previous to the suit for redemption, out of which this appeal arises, the mortgagors had in June, 1921, made a deposit under s. 83 of the Transfer of Property Act, 1882, for the purpose of redeeming the mortgage. The deposit was not accepted. Then they brought the suit for redemption. The suit was dismissed on a preliminary point and after the dismissal the mortgagors withdrew the deposit in September, 1923. The decree dismissing the suit was reversed in appeal and now the decree for redemption under appeal has come to be passed. In making that decree the lower Appellate Court has held the mortgagees responsible for mesne profits from the date of the first deposit in June, 1921 Against this decision the present appeal is preferred.

I am of opinion that the appeal succeeds. The mortgagors having withdrawn the

deposit were not entitled to claim the benefit of s. 83 of the Transfer of Property Act, 1882. As pointed out by the learned Judges of the Madras High Court in the case of *Krishnaswami Chettyar* v. *Thippa Ramaswami Chettyar* (1) that section does not include a deposit subsequently withdrawn. The case just now mentioned was followed in *Thevaraya Reddy* v. *Venkata Chala Pandithan* (2) and if I may respectfully say so, they were rightly decided.

I, therefore, allow this appeal and modify the decree for redemption passed by the Court below by striking out the mortgagees' liability for mesne profits from June, 1921, altogether. I would make no order as to costs in this Court and would not disturb the order as to costs in the Courts below.

Z. K. *Appeal allowed.*

(1) 8 Ind. Cas. 763; 35 M. 44; 9 M. L. T. 131; (1911) 1 M. W. N. 89.

(2) 37 Ind. Cas. 444; 40 M. 804; 31 M. L. J. 548; (1916) 2 M. W. N. 321; 20 M. L. T. 403; 4 L. W. 433.

RANGOON HIGH COURT.

SECOND CIVIL APPEAL No. 535 OF 1925.

June 14, 1926.

Present:—Mr. Justice Duckworth.

MAUNG TIN—APPELLANT

versus

MA DUN AND OTHERS—RESPONDENTS.

Minor—Estoppel—Attestation of sale-deed, whether creates estoppel against claiming share in land sold—Estoppel, whether can alter law.

The law relating to estoppel must be read together with and subject to, other laws in force, such as those relating to contract and transfer of property and where such laws declare an infant to be free of liability in respect of a particular transaction he cannot be made liable by virtue of an estoppel inasmuch as estoppel cannot alter the law.

The mere fact that a minor attested a sale-deed does not estop him from claiming his share in the land sold, if any.

Second appeal from a decree of the Additional District Judge, Pyapon, in C. A. No. 165 of 1924.

Mr. *Hay*, for the Appellant.

Mr. *U Ze Ya*, for the Respondents.

JUDGMENT.—The lower Appellate Court decided the first appeal merely on the question of estoppel. I think, that Court was in error in holding that appellant was estopped.

He was a minor, when the sale-deed was executed, and when he attested it, being then about only 14 years of age. It is not proved that he made any fraudulent misrepresentation when he attesed the sale-deed.

In any case, I am of the opinion that as he could not then contract, he could not be estopped. The law in such cases was stated in the case of *Brohma Dutt* v. *Dharmu Das Ghose* (1) but was perhaps too broadly stated for general application. It may be laid down as follows:—

The law relating to estoppel must be read together with, and subject to, other laws in force, such as those relating to contract and transfer of property, and that where such laws declare an infant to be free of liability in respect of a particular transaction, he cannot be made liable by virtue of an estoppel, for an estoppel cannot alter the law.

I do not think, therefore, that in the present case, the appellant was estopped from claiming his share in the land sold, if any.

The decree of the lower Appellate Court is set aside, and the case is remanded to that Court, to decide the appeal on the merits according to law.

The appellant will get the costs of this appeal from the respondents and a certificate under s. 13 of the Court Fees Act for return of the Court-fees paid on the memorandum of appeal in this Court.

A. N. A. *Case remanded.*

(1) 26 C. 381; 3 C. W. N. 468; 13 Ind. Dec. (N. S.) 846.

MADRAS HIGH COURT.
FULL BENCH.

CIVIL REVISION PETITION No. 742 OF 1925.

September 30, 1926.

Present:—Sir Victor Murray Coutts Trotter, KT., Chief Justice, Mr. Justice Jackson and Mr. Justice Sundaram Chetti.

O. A. O. K. LAKSHMANAN CHETTIAR —PETITIONER

versus

J. S. KANNAPPAR AND OTHERS—RESPONDENTS.

C. P. C. (Act V of 1908), s. 115—Madras City Municipal Act (IV of 1919), s. 59, r. (b)—"Elections", meaning of—Rules for conduct of elections, r. 4—Chief Judge of Small Cause Court, whether Court or persona designata—Revision against Chief Judge's order, whether maintainable—Returning Officer in Municipal elections, whether entitled to decide questions of disqualification of candidates—Rules purporting to be made under wrong provision of law, validity of.

Under the Madras City Municipal Act and r. 4 of the Rules framed under the Act the Chief Judge of the Court of Small Causes is *persona designata* and not merely a selected member of the Court chosen to represent it and the High Court has, therefore, no jurisdiction to entertain a revision petition under s. 115, C. P. C., against an order passed under r 4 on an election petition. [p. 150, col. 2.]

Municipal Corporation of Rangoon v. *M. A. Shakur* (2), followed.

Kakku Parthasarathy Naidu v. *Chinstlacheru Koteswara Rao* (1), distinguished.

The principle that whenever jurisdiction is vested in the Judge of a Court it must be deemed to be vested in that Judge as representing that Court applies only to a Court which by its constitution has only one Judge and it cannot govern a case where jurisdiction is conferred on a single member of a Court consisting of many Judges. [*ibid.*]

The word 'elections' within the meaning of s. 59, 2 (*b*) of the Madras City Municipal Act means completed elections which have resulted in the creation of a Councillor, and does not cover disputes arising before such election. But, though r. 4 purports to be made under s. 59, it is rendered valid by the generality of the powers conferred on the Governor-in-Council by s. 347 of the Act, and the rule is not vitiated by its description as having been made under a section which is not applicable. [p. 150, col. 1.]

Quære.—Whether the rule under the English Law that the Returning Officer has only to decide objections arising out of the nomination paper itself and has not to go into questions relating to the personal qualifications of the candidate applies to the Commissioner under the Madras City Municipal Act. [p. 151, col. 1.]

Petition, under s. 115 of Act V of 1908 and s. 107 of the Government of India Act, praying the High Court to revise an order of the Chief Judge of the Court of Small Causes, Madras, dated the 13th September 1926, in Municipal Election Revision Petition No. 1 of 1926.

Mr. *K. S. Krishnasami Iyengar*, for the Petitioner.

Mr. *Mockett*, for the Respondents.

JUDGMENT.—This is a civil revision petition brought by Rao Bahadur Lakshmanan Chettiar against an order made by the Chief Judge of the Small Cause Court in the following circumstances. On the 17th August, 1926, the petitioner was nominated as a candidate for election as a Divisional Councillor for the 29th division of the city. It is not in dispute that the nomination paper was regular on the face of it but it was said that the petitioner was disqualified for these reasons For some time past he had been an Honorary Presidency Magistrate of the city. On the 11th August he tendered his resignation having in mind, no doubt, s. 52 (1) (*b*) (*iv*) of the Madras City Municipal Act of 1919 which disqualifies a Presidency Magistrate which has been held to include an Honorary Magistrate for election as a Councillor. That resignation reached Government on the 14th August and Government passed a G. O. in the following term:—

'The Governor in Council withdraws the powers of Honorary Presidency Magistrate for the City of Madras conferred on the undermentioned gentleman (*i. e.*, the petitioner) who has resigned his appointment."

On the 20th August an objection was put forward by the respondents alleging that the withdrawal by the candidate from his appointment as Presidency Magistrate only took effect by virtue of the G. O. withdrawing his powers which was subsequent to his nomination, and that, therefore, the nomination was bad The objection was heard by the Commissioner acting under s. 4 hereinafter to be referred to of the rules made under the Act and a petition was put in for revision before the Chief Judge of the Court of Small Causes under the same rule. Both officers pronounced the nomination to be invalid and struck his name off the list of nominations in accordance with r. 3. Against that decision of the Chief Judge, this revision petition is brought.

Two main points have been argued before us: the first, which goes to the root of the whole matter, being that this Court has no jurisdiction to entertain any such petition, on the ground that the Chief Juge of the Small Cause Court is not a Court subject to the machinery of the C. P. C., but a *persona designata* whose decision is not only not appealable but cannot be called up in revision. It has been held by a Full Bench of this Court [*Kakku Parthasarathy Naidu* v. *Chinstlacheru Koteswara Rao* (1)] that the fact that his decision is not appealable so far from being a ground for holding that revision will not lie points decisively in the opposite direction. The appellant's contention as to the character in which the Chief Judge decided this matter depends partly upon a consideration of the relevent sections of the Municipal Act and the rules made thereunder, and partly on the effect of certain authorities which were cited to us. Section 59 (2) (*b*) of the Act provides that "the Governor-in-Council may make rules which may provide for the adjudication by

(1) 78 Ind. Cas. 98; 47 M. 369; 46 M. L. J. 201; 19 L. W. 402; (1924) M. W. N. 272; A. I. R. 1924 Mad. 561 (F. B.).

the Court of Small Causes of disputes..... arising out of elections."

In our opinion "elections" within the meaning of that section means completed elections which have resulted in the creation of a Councillor, and does not cover disputes arising before such election, but though r. 4, with which we are primarily concerned purports to be made under s. 59, we are of opinion that it is rendered valid by the generality of the powers conferred on the Governor-in-Council by s. 347 of the Act, and that the rule is not vitiated by its description as having been made under a section which is not applicable. Rule 4 gives power to a registered voter to make an objection to the list of candidates. Thereupon:

"the Commissioner is to give his decision on the objection in writing, which decision shall be final unless.....a petition for the revision is put in before the Chief Judge,"

and in such cases it is argued that the Chief Judge acting under r. 4, is in effect the Court of Small Causes functioning through him alone and that his decision is, therefore, subject to revision. It is said that this position is confirmed by O. I (*a*), r. 6 of the Rules of the Small Cause Court, 1912. The rule runs as follows;

"The Judges may sit apart or together at any time and any one or more of the Judges so sitting apart shall have all the judicial authority which is given to the Court by the principal Act or any other enactment for the time being in force, except in cases in which by such Act or other enactment or any rule or order having the force of law such powers are exercisable only by two or more Judges of the Court or only by the Chief Judge. It shall be competent to the Chief Judge to direct that any application, petition or suit shall be heard by a Bench consisting of two or more Judges of the Court."

The argument is that if by any Act or rule a matter shall be referred to the Chief Judge alone he is nevertheless acting as the Court. We are of opinion that this rule only applies to cases where the reference made by the Act or rule in question is clearly to the Court, though functioning through the Chief Judge and that it leaves untouched the real question which we have to decide; namely, whether this power was conferred by r. 4 made under the Municipal Act upon the Chief Judge as the Court functioning through himself or upon him as *persona designata*. Looking at the Municipal Act it is clear that the draftsman of that Act was quite alive to the distinction between the Court of Small Causes (*vide* s. 59) and the Chief Judge of that Court (*vide* s. 54). It is difficult to resist the inference that when the Chief Judge is referred to in the Act he was meant to act as a *persona designata* and not as representing the Court. The Full Bench decision in *Kakku Parthasarathi Naidu* v. *Chinstlacheru Koteswara Rao* (1) was relied upon for the proposition that whenever jurisdiction is vested in the Judge of a Court it must be deemed to be vested in that Judge as representing that Court. In that case a vesting of jurisdiction in a District Judge was held to be equivalent to vesting the jurisdiction in the District Court thereby subjecting his decision to the revisional powers of the High Court. It was pointed out in a judgment of a Full Bench in the Rangoon Court, *Municipal Corporation of Rangoon* v. *M. A. Shakur* (2), reviewing all the authorities with which we respectfully agree, that though that reasoning may apply to a Court which by its constitution has only one Judge it cannot govern a case where jurisdiction is conferred on a single member of a Court consisting of three Judges. It is obvious that words might easily have been used to indicate that while jurisdiction was conferred on the Small Cause Court, that Court should only function through its Chief Judge. We think that that distinction drawn by the Rangoon Court was correctly drawn and that nothing in the decision of the Full Bench in *Kakku Parthasarathi Naidu* v. *Chinstlacheru Koteswara Rao* (1) precludes us from holding, as we do hold, that under the Municipal Act and the rules the Chief Judge for this purpose is *persona designata* and not merely a selected member of the Court chosen to represent it. That being so, we have no jurisdiction to entertain this revision petition, and it mut be dismissed with costs.

But we think it is desirable that we should say a few words on the second point which was elaborately argued before us. That point was that the Commissioner and the Chief Judge were confined to question of form, and that it was entirely outside the ambit of their jurisdiction to enquire into grounds of disqualification which did not appear on the face of the

(2) 91 Ind. Cas. 550; 3 R. 560; 4 Bur. L. J. 202; A. I. R. 1926 Rang. 25.

nomination paper and would involve an enquiry into facts. The position of a Returning Officer in England is analogous generally to that of the Commissioner under the Madras Municipal Act, and it has been decided by a series of decisions in England, of which we need only cite *Pritchard* v. *Bangor Corporation* (3) and *Hobbs* v. *Morey* (4) that the Returning Officer is only to decide objections arising on the face of the nomination paper itself and not to go into questions relating to the personal qualifications of the candidate. Under s 52 of the Madras Act, among the disqualifications enumerated are that the person concerned is of unsound mind, or is interested in a contract with the Corporation. If the position be right that such allegations are to be investigated not after election but at the stage of candidature, the Commissioner might be faced with a series of elaborate enquiries relating to persons who might never reach the stage of election or appointment as a Councillor might indeed receive no votes at all. It is said that nevertheless the effect of the Madras Act is to throw the burden of conducting such enquiries upon the Comissioner with regard to every candidate at the stage of nomination, In view of our decision on the main point, it is unnecessary to pronounce upon this question But we think it desirable to point out the doubts that have been raised as to the effect of the Madras Act and to suggest that it should be amended in a manner that shall make it clear whether it is intended to invest the Commissioner with the wide powers suggested by the respondents or to confine him to the purely ministerial function with which alone he would be clothed if the principle of the English cases is to be applied. If the latter view is to prevail, there seems to be no good reason for granting an appeal to the Chief Judge or indeed to any other tribunal.

V. N. V. *Petition dismissed.*

(3) (1888) 13 A. C. 241; 57 L. J. Q. B. 313; 58 L. T. 502; 37 W. R. 103; 52 J. P. 564.

(4) (1904) 1 K. B. 74; 73 L. J. K. B. 47; 68 J. P. 132; 52 W. R. 318; 89 L. T. 531; 20 T. L. R. 50; 2 L. G. R. 7.

RANGOON HIGH COURT.

CIVIL MISCELLANEOUS APPEAL No. 98 OF 1925.

June 1, 1926.

Present:—Justice Sir Benjamin Herbert Heald, KT., and Mr. Justice Chari.

ABDUL KARIM ABDUL LATIFF —APPELLANTS

versus

AI-HNOOR AND OTHERS—PLAINTIFFS—RESPONDENTS.

C. P. C. (Act V of 1908), s. 151, O. IX, r. 8—Dismissal for default—Restoration—Inherent power of Court—Failure to file affidavit—Negligence of Advocate, effect of.

A Court has inherent power to restore a case dismissed for default of appearance where it is satisfied that the case is one in which it should exercise that power. [p. 152, col. 1.]

Bilasirai Laxminarayan v. *Cursondas Damodardas* (1) and *Lalta Prasad* v. *Ram Karan* (2), followed.

A Court may under proper circumstances refuse to make a party suffer for the incompetence or negligence of his Advocate in filing an application for restoration without a proper affidavit showing the reasons for non-appearance. [*ibid.*]

Appeal against an order of the District Judge, Mvaungmya.

Mr. *Keith*, for the Appellants.

Messrs. *Anklesaria Ganguli*, for the Respondents.

JUDGMENT. — This is an appeal against the order of the District Judge of Myaungmya refusing to set aside a dismissal order passed under O. IX, r 8, of the C. P. C, dismissing the plaintiffs' suit for default. On the 7th of February, 1925, the case was fixed before the learned District Judge. All the defendants, of whom there were many, had been served except three. There were two plaintiffs in the suit, who were brothers, and neither of them appeared when the case was called on that day. The learned Judge dismissed the suit presumably under O. IX, r. 8, though in the Diary he says it was dismissed for want of prosecution. Later on the same day an application was filed for setting aside the order of dismissal That application was a curious application consisting of two short paragraphs without any affidavit in support of it. In answer thereto a written objection was filed on behalf of defendants Nos. 14 to 18, supported by an affidavit by a man called Abdulla In spite of this the plaintiffs' Advocate does not seem to have realised the necessity for filing an affidavit to explain the absence of the 1st plaintiff himself, and even if the cause assigned in the petition for his absence is correct, the reasons for the absence of

the 2nd plaintiff were unexplained. The learned Judge of the trial Court dismissed the plaintiffs' application and they now come up in appeal. They have filed in this Court a certificate that the 2nd plaintiff's daughter died on the 9th of February at Myaungmya and it is stated on their behalf that she was very ill on the 7th of February, and that, therefore, the 2nd plaintiff who believed that the 1st plaintiff would be in Myaungmya in time did not attend the Court. In the petition filed by the 1st plaintiff it was alleged that on account of the fog his boat was late and that he came to Court with his Rangoon Advocate just a few minutes after the case had been called and dismissed. It is argued on behalf of the respondents that there is no affidavit in the record to show that the 2nd plaintiff's statement is correct and that he should have known that at that time of the year the boats would be subject to delay on account of fogs and should have taken precautions to reach Myaungmya earlier and further that he could have engaged a local Advocate instead of relying on an Advocate from Rangoon. There is force in the arguments put forward by the respondents' Advocate but at the same time considering the importance of the case and the value of the property involved, we are not disposed to visit the sins of the Advocate on the plaintiffs and make them suffer for the incompetence and negligence of their Advocate in filing their application without an affidavit. Counsel for the appellants has asked us either to let him file an affidavit in this Court to show why the plaintiffs were absent when the case was called, or to remand the case in order to enable them to produce such evidence in the trial Court.

We do not think that in the present case it is necessary to remand the case for that purpose. The Court has inherent power to restore a case dismissed for default if it is satisfied that the case is one in which it should exercise that power. Our attention has been drawn to the Full Bench Rulings of the Madras High Court in which it has been held that the Court has no such power but we find that the Bombay and Allahabad High Courts have taken a different view [see the cases of *Bilasirai Laxminarayan* v. *Cursondas Damodardas* (1) and *Lalta Prasad* v. *Ram Karan* (2)] and we are of opinion that the Court has such power and that the learned Judge of the trial Court should in the exercise of his inherent power have restored the case. We accordingly set aside the order of the trial Court and direct that the order dismissing the suit be set aside and the same be proceeded with from the stage where it was left off.

Appellants will pay the respondents' costs in this Court, Advocate's fee for each Advocate to be two gold *mohurs*.

A. N. A. *Appeal allowed.*

(1) 53 Ind. Cas. 252; 41 B. 82; 21 Bom. L. R. 952.
(2) 14 Ind. Cas. 187; 34 A. 426; 9 A. L. J. 666.

MADRAS HIGH COURT.
FULL BENCH.

CIVIL MISCELLANEOUS PETITION No. 3304 OF 1926.

October 7, 1926.

Present:—Sir Victor Murray Coutts Trotter, KT., Chief Justice, Mr. Justice Jackson and Mr. Justice Sundaram Chetti.

O. A. O. K. LAKSHMANAN CHETTIAR —PETITIONER

versus

THE COMMISSIONER, CORPORATION OF MADRAS AND ANOTHER— RESPONDENTS.

Writ of certiorari—*Jurisdiction of High Court, nature of—Discretion—Submission by not raising point of jurisdiction—Rule, whether confined to question of fact or extends to question of law.*

In issuing a prerogative writ of *certiorari*, the High Court of Madras acts not under any Statute but under the inherent powers which devolved upon the High Court from the old Supreme Court and the High Court, therefore, stands with regard to such a writ in the same position as the Court of King's Bench in England and ought to follow the rules laid down by that Court in the decided English cases as to the scope and limitations of its jurisdiction. [p. 153, col. 2.]

Such jurisdiction is purely discretionary and *certiorari* will not lie where the person who applies for that writ has by his conduct taken the chance of a pronouncement in his favour by the lower Court on the merits. Failure to object to the jurisdiction of a Court operates as a bar to an application for a writ of *certiorari* not only where the objection rests on a question of fact but also where it is one of law. [*ibid.*]

Where objection was taken to the validity of a nomination paper in respect of an election on the ground that the candidate was disqualified under the rules to stand and the point was argued on the merits in a lower Court, no question of jurisdiction having been raised by the affected candidate and the Returning Officer upheld the objection as to invalidity and rejected the nomination paper and the Chief Judge, Small Cause Court, upheld the order of rejection on the merits, on an application to the High Court to issue a writ of *certiorari* against the officers:

Held, that the applicant had submitted himself to a jurisdiction which he could not be allowed afterwards to seek to repudiate and had by his conduct precluded the Court from exercising a discretionary jurisdiction in his favour. [p. 154, col. 1.]

R. v. *Justices of Salop* (2), *Reg.* v. *Justices of Leicester* (3), *Reg.* v. *Knox* (4), *Rex.* v. *Williams* (5), *Rex.* v. *West Suffolk Compensation Authority* (6), followed.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* to the Commissioner, Corporation of Madras, and the Chief Judge, Court of Small Causes, Madras, or either of them commanding him or either of them to send forthwith to and before this Court all and singular, the orders (1) of the Commissioner of the Corporation of Madras, dated the 24th August, 1926, in the matter of the 29th (Royapettah) Division election, (2) of the Chief Judge, the Court of Small Causes, Madras, dated the 13th September, 1926, passed in revision of the said order of the Commissioner of the Corporation of Madras with all things touching the same as fully and perfectly as they or either of them have been made by them or either of them and now remaining in the custody or power of both or either of them so that this Hon'ble Court may cause further to be done thereon, what of right and according to law this Hon'ble Court shall see fit to be done and for passing such further or other orders as this Hon'ble Court may consider just and necessary under the circumstances.

The petition coming on for final hearing upon perusing the petition and the affidavit filed in support thereof and the order of this Court dated the 1st October, 1926, and made herein and upon hearing the arguments of Mr. *K. S. Krishnaswami Aiyengar* for Mr. *K. S. Rajagopala Iyengar*, for the Petitioner and of Mr. *Vere Mockett* and Mr. *S. Rangaswami Iyengar*, for the 1st Respondent, and Counsel not appearing on behalf of the 2nd respondent the Court delivered the following

JUDGMENT.—This is an application for writ of *certiorari* directed to the Commissioner of the Corporation of Madras and the Chief Judge of the Court of Small Causes to call up their orders passed in the matter of Rao Bahadur Lakshmanan Chettiar declaring him to be disqualified as a candidate at the election about to be held to select a Councillor for the 29th Division of this city. Our interference is invoked on the ground that both these officers acted without jurisdiction and that, therefore, their orders should be quashed. In such a matter we act not under Statute but under the inherent powers which devolve upon us from the old Supreme Court of Madras. We, therefore, stand with regard to prerogative writs in the same position as the Court of King's Bench in England and, in our opinion, we ought to follow the rules laid down by that Court in the decided English cases as to the scope and limitations of its jurisdiction. The facts were stated by us in our decision in *Lakshmanan Chettiar* v. *J. S. Kannappar* (1) and it is unnecessary to repeat them. The broad ground on which the jurisdiction of these officers is challenged is that whereas they were only empowered to inquire into disabilities appearing on the face of the nomination paper they in fact travelled outside that jurisdiction and went into a matter of substance which was arguable on grounds not appearing on the face of the nomination paper. Mr. Mockett has taken the preliminary objection that *certiorari* will not lie where the person who applies for that writ has by his conduct taken the chance of a pronouncement in his favour by the lower Court on the merits. Mr. Krishnaswami Iyengar for the petitioner has frankly conceded that his client did argue the case on the merits both before the Commissioner and before the Chief Judge and that he did not only not confine himself to the contention that those officers had no jurisdiction to entertain an objection to the jurisdiction but that he did not take this point at all. The English authorities which were cited *prima facie* establish the proposition that in such circumstances the applicant cannot obtain a writ of *certiorari ex debito justitiæ* but that the Court is exercising a purely discretionary power. See *R.* v. *Justices of Salop* (2), *Reg.* v. *Justices of Leicester* (3), *Reg.* v. *Knox* (4), *Rex* v. *Williams* (5) and *Rex* v. *West Suffolk Compensation Authority* (6). The point

(1) 99 Ind. Cas. 148; 24 L. W. 773.
(2) (1859) 29 L. J. M. C. 39; 2 El. & El. 386; 6 Jur. (N. S.) 143; 119 E. R. 772; 121 E. R. 146.
(3) (1860) 29 L. J. M. C. 203; 2 L. T. 436; 8 W. R. 563.
(4) (1863) 32 L. J. M. C. 257; 8 L. T. 330; 11 W. R. 703.
(5) (1914) 1 K. B. 608; 83 L. J. K. B. 528; 110 L. T. 372; 78 J. P. 148.
(6) (1919) 2 K. B. 374; 88 L. J. K. B. 1022; 121 L. T. 88; 83 J. P. 161; 63 S. J. 574; 35 T. L. R. 437.

taken by Mr. Krishnaswami Iyengar, is that failure to object to the jurisdiction of the Court whose order is sought to be quashed only debars the applicant when the objection is one involving the investigation of facts which were or should have been within the knowledge of the applicant when he was before the lower Court, and does not apply to a contention of law. We see no warrant in the cases for drawing any such distinction, because in our opinion the test that they lay down is whether the applicant armed with a point either of law or of fact which would oust the jurisdiction of the lower Court has elected to argue the case on its merits, before that Court. If so, he has submitted himself to a jurisdiction which he cannot be allowed afterwards to seek to repudiate. We are of opinion that the applicant has so conducted himself as to preclude this Court from exercising a discretionary jurisdiction in his favour. The petition will, therefore, be dismissed with taxed costs.

The *interim* order passed on the 1st October will be vacated.

V. N. V.
A. N. A. *Petition dismissed.*

OUDH CHIEF COURT.

SECOND CIVIL APPEAL No. 510 OF 1925.
November 24, 1926.
Present: —Mr. Justice Misra and
Mr. Justice Raza.
PIRTHIPAL SINGH AND ANOTHER—
PLAINTIFFS—APPELLANTS
versus
RAMESHWAR AND ANOTHER—DEFENDANTS
—RESPONDENTS.

Hindu Law—Joint family—Manager, power of—Mortgage—Legal necessity—Decree for foreclosure against manager of joint family alone, whether binding on other members.

A decree for foreclosure obtained against the manager of a joint Hindu family alone on the basis of a mortgage executed by him for legal necessity is binding upon the other members of the family though they were impleaded as parties in the suit. [p. 155, col. 1.]

The requirements of O. XXXIV, r. 1, C. P. C., are substantially complied with in such cases if the manager of the family has been impleaded. [p. 155, col. 2.]

[Case-law reviewed.]

Where the circumstances show that a person sued is the manager of a joint Hindu family and the property involved is family property, the natural and legitimate inference is that he is sued in his capacity as manager. [p. 157, col. 2; p. 158, col. 1.]

Second civil appeal against a decree of the Additional Subordinate Judge, Unao, dated the 21st July, 1925, upholding that of the Munsif, Safipur at Unao, dated the 26th November, 1924

Mr. *R. B. Lal*, for the Appellants.

Mr. *Raj Bahadur* for Mr. *Mukand Behari Lal*, for the Respondents.

JUDGMENT.—This is a plaintiffs' appeal in a suit brought by them for possession of a 3-pies share in village Brijpalpur, District Unao. The facts of the case are that one Bhabuti Singh, who is the own brother of the plaintiffs-appellants, mortgaged the said share to one Rameshwar, defendant-respondent No. 1, for a sum of Rs. 300 by means of a deed of mortgage, dated the 29th September, 1909. The mortgage provided for foreclosure and consequently respondent No. 1 obtained on the 11th July, 1916, a decree for foreclosure on the basis of the said deed, which was made absolute on the 16th March, 1918; and the effect of which was that the mortgage in favour of respondent No. 1 had become foreclosed. The case laid by the plaintiffs in the plaint is to the effect that the mortgaged property being ancestral and thus joint family property the decree for foreclosure was invalid and unenforceable. It was denied that the money borrowed under the said deed of mortgage was borrowed for family necessity. The plaintiffs, therefore, claimed a decree for proprietary and actual possession of the aforesaid 3-pies share with a declaration to the effect that the absolute decree for foreclosure dated the 16th March, 1918, was not binding on them.

Defendant No. 1 Rameshwar who was the principal defendant in the case, contended in defence that defendant No. 2, the original mortgagor, was separate from the plaintiffs and had mortgaged only his own share. He also urged that if the family be found to be a joint family consisting of the plaintiffs and defendant No. 2, the decree for foreclosure obtained by him was binding on the plaintiffs also inasmuch as the mortgage-deed dated the 29th September, 1909, had been executed for legal necessity and they were, therefore, not entitled to recover any portion of the property in suit.

The learned Munsif of Safipur who tried the suit found that the family of the plaintiffs and defendant No. 2 was joint and that the property in suit was their

ancestral joint family property. He, however, found that the money borrowed under the mortgage-deed on the basis of which the decree for foreclosure had been passed, was borrowed for legal necessity and the decree, therefore, was binding upon the plaintiffs. On these findings he dismissed the plaintiffs' suit.

The learned Additional Subordinate Judge of Unao who heard the appeal agreed with all these findings of the learned Munsif and dismissed the appeal.

The plaintiffs have now come to this Court in second appeal and it is now admitted on their behalf that the mortgage dated the 29th September, 1909, was executed for legal necessity by defendant No. 2, Bhabhuti Singh, who happened to be the manager of the family at the time of the execution of the deed It is also admitted that he was also the manager of the family when the decree for forclosure was passed against him. The only point that has now been urged in second appeal is that the plaintiffs not having been impleaded in the foreclosure suit were no parties to the foreclosure decree and on that ground alone they are entitled to recover the property in suit.

We have heard the parties in this case at great length and have come to the conclusion that the appeal must fail. We now proceed to give our reasons for that decision.

It is clear from the findings arrived at in the case, as stated above, that the mortgage in dispute was executed for legal necessity by Bhabhuti Singh who then happened to be the manager of the family consisting of himself and his two younger brothers, who are now appellants before us. It is also clear that when defendant-respondent No. 1 brought a suit on the basis of his mortgage and obtained a foreclosure decree against the defendant No. 2 he even then occupied the position of the manager. The sole point which we are, therefore, asked to decide is whether a decree for foreclosure obtained against the manager of a joint family alone on the basis of a mortgage executed by him for legal necessity, is binding upon other members of the family who have not been impleaded in the suit. We are clearly of opinion that the plaintiffs were fully and effectively represented in the suit which was brought for foreclosure by defendant-respondent No. 1 against defendant-respondent No. 2 and that the decree passed in that suit is binding not only upon the defendant No. 2 but also upon the plaintiffs. It was contended before us on behalf of the appellant that under O XXXIV, r. 1 of the C. P. C., (Act V of 1908) the plaintiffs having an interest in the mortgaged property and in the right to redeem should have been joined as parties to the suit brought on the basis of the mortgage of 1909, and if they were not impleaded in that suit their right of redemption cannot be destroyed and they must be allowed an opportunity to exercise that right. We are unable to accept that contention for the obvious reason that Bhabhuti Singh, defendant No. 2, being the manager of the family consisting of himself and the plaintiffs effectively represented them in the foreclosure suit and the provisions of O. XXXIV, r. 1 were substantially complied with. This matter was discussed at great length in a Full Bench decision of the Allahabad High Court reported as *Hori Lal* v. *Nimman Kunwar* (1). Richards, C. J., observed in that case that it seemed to him to be impossible to dispute the proposition that it was a general rule of Hindu Law that the manager represented the family in all transactions with the outer world, provided these transactions were family matters. "Indeed", he observed, "if it were not so, it would be difficult to understand how the affairs of the family could be carried on."

Banerji, J., remarked that the requirements of O. XXXIV, r. 1, C. P. C., on which reliance had also been placed in that case were in his opinion fulfilled if the managers of the family of which they were representatives had been impleaded in the case. "A manager," he observed, "represents a joint Hindu family in all business transactions: he can enter into contracts in regard to matters relating to the family, give discharges for debts due to the family, and pay debts due by the family. When, therefore, in respect of a mortgage due to or by the joint family, he sues or is sued in his own name in his capacity as manager, all the other members of the family being represented by him must be deemed to have sued or been sued through him."

Tudball, J., was of the same opinion. Chamier, J., remarked in his judgment that both on principle and on authority he was of opinion that the manager of a joint Hindu family suing as such could maintain

(1) 15 Ind. Cas. 126; 34 A. 549; 9 A. L. J. 819 (F. B.).

a suit alone for the recovery of a mortgage-debt due to the family and that a suit could be maintained against the manager of the joint family alone to enforce a mortgage against property belonging to the family. He was also of opinion that if the manager sufficiently represented the family the provisions of O. XXXIV, r. 1, C. P. C., must be deemed to have been complied with. In deciding this case their Lordships of the Allahabad High Court relied on a ruling of their Lordships of the Privy Council reported as *Kishen Parshad* v. *Har Narain Singh* (2), where it was held that the managing members of a joint Hindu family business were entitled to maintain suits brought to enforce contracts made in the course of that business without joining in the suits with them either as plaintiffs or as defendants the other members of the family. In the case of *Sheo Shankar Ram* v. *Jaddo Kunwar* (3) which went to their Lordships of the Privy Council on appeal from the Allahabad High Court, the question for decision before them was whether the plaintiffs in that suit were bound by the foreclosure decree passed against the manager of the joint family on the ground that the family was effectively represented in the suit. Their Lordships observed as follows:—

"There seems to be no doubt upon the Indian decisions (from which their Lordships see no reason to dissent) that there are occasions, including foreclosure actions, when the managers of a joint Hindu family so effectively represent all other members of the family that the family as a whole is bound. It is quite clear from the facts of this case and the findings of the Courts upon them that this is a case where this principle ought to be applied. There is not the slightest ground for suggesting that the managers of the joint family did not act in every way in the interests of the family itself..... ....."

In *Ganpat Lal* v. *Bindbasini Prashad Narayan Singh* (4), their Lordships of the Privy Council held that a sale in execution of a decree obtained against the manager alone was binding upon other members of the family and they could not subsequently be allowed to exercise their right to redeem. We would like to quote in full the observations of their Lordships regarding this matter:—

"In their Lordships' opinion", observed their Lordships, "these learned Judges (Judges of the High Court of Calcutta) failed to appreciate the effect on the proceedings of the altered plaint and thus misunderstood the real issues involved in the action. The Subordinate Judge rightly says that the plaintiffs do not 'impeach the mortgage decree. Their pleadings show that they could not at any time have done so and their prayer does not ask to do so. All that they ask is to exercise their alleged right to redeem. And here they have to face the fact that they refused to seek to set aside the sales. Their Lordships have no doubt that while the decree for sale stands and sale has taken place under it, the right to redeem is extinguished unless the sale be set aside. After the sale has taken place the owner holds as purchaser, and is entitled to raise all the defences that belong to him as such, and unless the claim to set aside the sale is made in a properly constituted action and properly raised in suitable pleadings in that action, the Court cannot, interfere with possession which has been given him by the purchase. It follows, therefore, that the plaintiffs can no longer exercise any right of redemption that they may have possessed, so that it is not necessary to decide as to the extent of that right if they had properly asserted it." (*Vide* pages 930* and 931*).

This decision of their Lordships was followed in two recent decisions of the late Court of the Judicial Commissioner of Oudh, one reported as *Bhagirathi* v. *Onkar Nath* (5), decided by Daniels, A. J. C., and Dalal, A. J. C., and the other reported as *Mahadeo Bakhsh* v. *Suraj Bakhsh Singh* (6), decided by Dalal, J. C., and Simpson, A. J. C. In the first case it was held that a Hindu son or grandson could not escape the effect of a foreclosure decree passed against his father or gandfather on a mort-

(2) 9 Ind. Cas. 739; 33 A. 272; 15 C. W. N. 321; 8 A. L. J. 256; 9 M. L. T. 343; 13 C. L. J. 345; 21 M. L. J. 378; 13 Bom. L. R. 359; (1911) 2 M. W. N. 395; 38 I. A. 45 (P. C.).

(3) 24 Ind. Cas. 504; 36 A. 383; 18 C. W. N. 968; 16 M. L. T. 175; (1914) M. W. N. 592; 1 L. W. 645; 20 C. L. J. 282; 12 A. L. J. 1173; 16 Bom. L. R. 810; 41 I. A. 216 (P. C.).

(4) 56 Ind Cas. 274; 47 C. 924; 18 A. L. J. 555; (1920) M. W. N. 382; 12 L. W. 59; 39 M. L. J. 108; 2 U. P. L. R. (P. C.) 103; 24 C. W. N. 954; 28 M. L. T. 330; 47 I. A. 91 (P. C.).

(5) 72 Ind. Cas. 142; 10 O. L. J. 185; 9 O. & A. L. R. 165; A. I. R. 1924 Oudh 17.

(6) 80 Ind. Cas. 447; 10 O. L. J. 252; A. I. R. 1924 Oudh 34.

*Pages of 47 C.—[*Ed.*]

gage executed for purposes binding on the family estate merely because he was not impleaded by name in the suit, inasmuch as the ancestor of a family must be presumed to represent his descendants in conducting a litigation in the same manner as in executing a mortgage. In the second case a Hindu grandfather had mortgaged joint ancestral property and after his death the mortgagee obtained a preliminary decree for foreclosure against two sons of the mortgagor and a final decree for foreclosure was subsequently passed and the mortgagee entered into possession. At the time of the mortgage there was one grandson in existence and two grandsons at the time of the suit brought by the mortgagee. The grandsons who were not impleaded in the foreclosure suit brought a suit to recover the property against the mortgagee and treated the foreclosure decree as a nullity. They also claimed in the alternative that they should be allowed to redeem the property on payment of the sum due under the foreclosure decree. It was decided that the joint family was effectively represented in the suit for foreclosure and the plaintiffs could not recover the property foreclosed merely on the ground that they were not impleaded in the foreclosure suit. They must, in order to be able to do so, prove the illusory character or the immorality of the debt contracted by the grandfather.

It was strenuously contended before us by the learned Pleader for the plaintiffs-appellants that these authorities only dealt with cases where suits to recover property or for being allowed to exercise the right of redemption had been brought either by the sons or by the grandsons and could not be treated as good authorities in cases where members of the family who were not sons or grandsons and had not been impleaded brought the suit to recover the property or to be allowed to exercise the right of redemption. In our opinion there is no difference in principle between the two cases. If a Hindu father can effectively represent his sons there is no reason why a brother or an uncle who happens to be the manager of the family should not similarly be able to effectively represent his younger brothers and nephews in the suit brought against him to enforce a mortgage executed for family necessity. The real point which has to be borne in mind in such cases is whether the deed was one executed for legal necessity. If such be the case it affects the entire family property and if a suit is brought on the basis of that deed against the manager alone the decree passed in such a suit is binding on all the members of the family. We are supported in this view by a decision of the Allahabad High Court reported as *Tulshi* v. *Bishnath Rai* (7) decided by Mears, C. J., and Banerji, J., by a decision of the Patna High Court in *Jog Sah* v. *Ram Chandra Prasad* (8), decided by Jwala Prasad, A. C. J., and Das, J., and by a decision of their Lordships of the Privy Council reported as *Daulat Ram* v. *Mehr Chand* (9).

A contention was also raised in appeal by the learned Pleader for the appellants that Bhabhuti Singh, the mortgagor, had described himself in the deed as the owner of the mortgaged property and that when respondent No. 1 brought the suit to enforce the mortgage he did not describe him as the manager of the family. It was, therefore, urged that the mortgage-deed on the basis of which the foreclosure decree had been obtained should not be considered to have been executed by Bhabhuti Singh as the manager of the joint family; nor could the suit brought against him by the mortgagee be considered to be a suit brought against him in a representative capacity. We regret we are unable to accept the contention. It is within our experience that in many cases of mortgages executed in this Province by managers of a joint Hindu family they described themselves as being the owners of the property just as guardians of minors in several cases describe themselves as owners of the property belonging to the minors. We are of opinion that where it is clearly established that the property is joint family property and the mortgage is executed by one who is proved to be the manager of the family such a description in the deed would not affect in any way the actual character of the deed, it being one executed by him as manager of the family.

Regarding the second contention we are of opinion that where the circumstances of the case are clear showing that a person sued happened to be a manager of a

(7) 71 Ind. Cas. 623; 21 A. L. J. 175; A. I. R. 1923 All. 284.
(8) 63 Ind. Cas. 564; 6 P. L. J. 640; (1921) Pat. 289; 2 P. L. T. 553.
(9) 15 C. 70; 14 I. A. 187; 11 Ind. Jur. 435; 5 Sar. P. C. J. 84; 1 P. R. 1888; 7 Ind. Dec. (N. S.) 632 (P. C.).

joint family and that the property involved in the suit was the family property, the natural and legitimate inference to be drawn should be that the defendant had been sued in the capacity of the manager It is not necessary that the plaintiff should state in distinct terms that he is suing as manager or that the defendant is being sued as manager. We are supported in this view by a decision of the Madras High Court reported in *Jijamba Bai Sahib* v. *Sagram Jathai Row Sahib* (10) and by a decision of the late Court of the Judicial Commissioner of Oudh reported in *Sheo Dulare Misra* v. *Brij Bhukhan Lal* (11).

We are, therefore, of opinion that the mortgage executed by Bhabhuti Singh on the 28th September, 1909, was executed by him, as found by the Courts below, in his capacity of the manager of the joint family of which the plaintiffs also were members and is binding on them, because it has been found to have been executed for legal necessity. We are also of opinion that the decree for foreclosure obtained by defendant-respondent No. 1 against defendant-respondent No. 2 was passed against him in the capacity of the manager of the joint family and is, therefore, binding on the plaintiffs also.

The appeal, therefore, fails and is dismissed with costs.

G. H. *Appeal dismissed.*

A. N. A.

(10) 14 Ind. Cas. 374; 22 M. L. J. 45.
(11) 25 Ind. Cas. 849; 1 O. L. J. 456.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 926 OF 1923.

August 2, 1926.

Present :—Mr. Justice Odgers.

GOVINDASAMI CHETTIAR—PLAINTIFF—APPELLANT

versus

K. KOTHANDAPANI CHETTIAR AND ANOTHER—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 127, 144—Suit by co-parcener to set aside alienation by manager—Mere absence of co-parcener for over statutory period, effect of—Exclusion or abandonment, what constitutes—Adverse possession.

To constitute adverse possession against the interest of a member of a joint Hindu family, it must be proved that he has either been excluded to his knowledge or that he has voluntarily abandoned his rights. Such exclusion or abandonment cannot be inferred from the mere fact of his absence from the place for over the statutory period. [p. 159, col 1]

In a suit against an alienee of a co-parcener, in considering adverse possession the Court is entitled to consider the origin and quality of possession and unless exclusion or abandonment is proved, the question of adverse possession cannot arise. [p. 159, col 2]

Obiter: Adverse possession cannot be acquired against a co-parcener in a joint Hindu family without his being put on notice either actual or constructive that adverse possession is running against him. [*ibid.*]

Second appeal against a decree of the District Court, East Tanjore at Negapatam, in A. S No 80 of 1922, preferred against a decree of the Court of the District Munsif, Mayavaram, in O. S No 383 of 1918.

Mr *K. V. Krishnaswami Iyer*, for the Appellant.

Mr. *T. V. Muthukrishna Iyer*, for the Respondents.

JUDGMENT.—This was a suit by the plaintiff for a share in certain properties (now reduced to a family house) as co-parcener. The plaintiff, the 1st defendant's father, and one Kothandapani Chetti were sons of one Gopal Chetty. The youngest son became a convert to Muhammadanism, the second son predeceased his father and the eldest son, the plaintiff, was absent for many years, some 18, in the Straits Settlements. During his absence the youngest brother, now a Muhammadan, conveyed his share in the property in question to a stranger, the 2nd defendant, and in 1902 the mother of the 1st defendant effected a mortgage on the property and in 1915 the 1st defendant conveyed the property to the 3rd defendant with a covenant that he should pay off the mortgage. The question, therefore, is as to the plaintiff's right in the house.

The District Munsif held that the plaintiff was entitled to one-third share of the house and one-third in the land. As to the latter there is no appeal and we are not concerned with that.

On appeal to the lower Appellate Court the latter held that as the house had all along been in the possession of first, the mortgagee and afterwards the 3rd defendant who paid off the mortgage, the rights of the plaintiff had become barred by the exclusive and adverse possession on the part of the mortgagee and the 3rd defendant who paid him off.

The question is, can this finding of the learned District Judge be supported? It is obvious that the 1st defendant's posses-

sion was the possession as a co-parcener on behalf of the plaintiff, also, and, it is to my mind equally obvious that while the plaintiff was in either actual or constructive possession of his undivided share in the family house, 1st defendant would have had no right whatever to effect an alienation of anything more than his own undivided share. Why should the absence of the plaintiff for a number of years make any difference unless we can assume from the fact of that absence that he has been excluded from his share or he has voluntarily abandoned it? It seems to me that it would be an unjust thing to hold that although the alienee of the 1st defendant would ordinarily acquire nothing more than the latter's share on a conveyance he is in a better position owing to the absence of the plaintiff Therefore, it seems to me to turn as to this point exclusively on the consequences of the plaintiff's absence and it must be proved that he has either been excluded to his knowledge or voluntarily abandoned his rights. The findings of the District Munsif show to my mind the direct contrary of any such exclusion or abandonment. There is no finding on this point by the learned District Judge because the only question argued before him was this question of adverse possession. The findings of the District Munsif are that after the departure of the plaintiff to foreign parts, his wife continued to reside in the family house, that in the sale deed of 1915 by the 1st defendant to the 3rd provision is made for the continued residence of the plaintiff's wife in the house. The 3rd defendant admits that she apent Rs. 100 for the marriage of the daughter of the plaintiff. It is said that the presence of the plaintiff's wife in the house is due to a Will by Gopal Chetty in favour of the 1st defendant and the wife of the plaintiff. The Will which was, of course, inoperative in law on the co-parcenary property is dated 1898. Gopal Chetty is said in the plaint to have died about 5 years before the suit which would be 1913. It seems a fair inference from the facts that between the early part of 1898 when probably the plaintiff left for the Strait Settlements and the death of Gopal Chetty which is the date from which the Will if operative would have taken effect, the plaintiff's wife was living in the house as the wife of a co-parcener entitled to right of residence. If that is so it can make no difference that she derived another title from an inoperative Will said to have taken effect some time after that date If her possession can be traced to a lawful source as I think it can be there is no reason to suppose that it has been displaced until proof is forthcoming I do not think that the fact that it has been held that Art. 144 applies to suits against the alienee of a co parcener and not Art. 127 can make any difference, as obviously in considering cases of adverse possession one is clearly entitled to consider the origin and quality of the possession, and as I have already said above in this particular case unless exclusion or abandonment is proved the question of adverse possession does not arise. A point which had come before me on a previous occasion has been agitated in this case, namely, as to whether adverse possession can be acquired against a co parcener without his being put on notice either actual or constructive that adverse possession is running against him. There are cases on either side of the line and the matter does not appear to have been authoritatively disposed of at least as far as this Court is concerned. I had occasion sitting with Mr. Justice Ayling, in S. A. No. 2019 of 1920 to examine the cases on this question at some length and my opinion then was that such adverse possession could not be acquired without notice to or knowledge of the co-parcener against whom it was so acquired. The same opinion was expressed by Ayling and Tyabji, JJ., in *Muthukrishna Iyangar* v. *Sankaranarayana Iyer* (1). In *Venkatarama Iyer* v. *Subramania Sastry* (2) Oldfield and Ramesam, JJ., held that in order to establish a title by prescription in a co-owner there should be evidence of exclusion of the other co-owners from possession or of assertion of an exclusive title and also that a transferee from a co-owner with actual or constructive notice of the fact that his alienor was only a co-sharer is also bound to prove exclusion by him of the other co-sharers if he wants to establish a title by prescription. Where the transferee has no such notice he will be on the same footing as any ordinary transferee with an independent but an invalid title or with none. On the other

(1) 25 Ind. Cas 573; 16 M. L. T. 196; 1 L. W. 699; (1914) M. W. N. 708; 27 M. L. J. 600.
(2) 78 Ind. Cas. 37; 20 L. W. 122; A. I R. 1924 Mad. 741.

hand, there are two cases in *Ahdul Gafur* v. *Ashamath Bibi* (3) and in *Linga Munisami Reddy* v. *Koindasami Naicken* (4) which seem to point the other way. Both these decisions were examined by me in the Second Appeal No. 2019 of 1920 referred to above and I there stated my reasons for not adopting them. Although the law thus stands in some uncertainty with regard to this question of notice, as to which I must say I remain unconverted, I think the present second appeal can be decided on the fact of want of any evidence of exclusion or abandonment. In fact, in my opinion, the evidence points all the other way. Now the question is whether the plaintiff is to get a third half of the house.

As regards the second appeal it seems to me that there are only two people concerned, namely, the plaintiff and the 1st defendant's father and his representatives or transferees. There is no question, as already stated, of Kothandapani's share in the house so that it is clear that by the relinquishment so to speak of that share 1st defendant and his representatives cannot be enriched at the expense of the plaintiff. I, therefore, think that the plaintiff ought to get half the house. As to the money obtained from the mortgage of the house, Ex. VI, the mortgage was executed by the widow of the 1st defendant's father as guardian of the 1st defendant. It is not clear how she can either in fact or in law represent the plaintiff whom I have already held not to have been excluded so as to bind him. The effect of the alienation, Ex. VI, was in fact to do nothing more than to bind 1st defendant's share. It, therefore, appears to me that the plaintiff is not required to shoulder any part of the mortgage-debt.

In the result the decree of the learned District Judge must be reversed and there must be a decree for the plaintiff in the sense indicated above with costs here and in the lower Appellate Court.

Decree reversed.

V. N. V.

A. N. A.

(3) 54 Ind. Cas. 385; 11 L. W. 31.
(4) 70 Ind. Cas. 317; 15 L. W. 294; 42 M. L. J. 364; A. I. R. 1922 Mad. 369.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 154-B OF 1924.

October 8, 1926.

Present:—Mr. Kinkhede, A. J. C.

Shrimant Kuar LAXMANRAO BHONSLEY—DEFENDANT No. 1—APPELLANT

versus

NARAIN AND ANOTHER—PLAINTIFFS—RESPONDENTS.

C. P. C. (Act V of 1908), O. XXII, r. 2—Legal representative of plaintiff—New right, whether can be set up—Kamdar, *office of, minor, whether can hold.*

A minor is *prima facie* considered to be disqualified like a female to hold the office of a *kamdar*, which is necessarily a position of confidence and respectability and ordinarily none but an adult male can be considered to be fit to hold it, though a minor or a female may be entitled to hold the office by virtue of a special custom or reservation of a right under the terms of a *sanad*. [p. 161, col. 1.]

A legal representative must continue the litigation on the cause of action sued upon and cannot set up or agitate a new right of suit or his own individual right. [p. 160, col. 2]

Second appeal against the decision of the Additional District Judge, Buldana, dated the 31st January 1924, in Civil Appeal No. 19 of 1923.

Sir *B. K. Bose* and Mr. *P. N. Rudra*, for the Appellant.

Mr. *M. B. Niyogi*, for the Respondents.

JUDGMENT.—I think that in view of the death of Krishna Rao, who was a co appellant and co-plaintiff with Janki Bai, this case must go back for an investigation of the question of the surviving plaintiff *Musammat* Janki Bai's right to sue or continue the suit in her sole name. That question was not material so long as Krishna Rao was a co-plaintiff with her as he alone even could have maintained the suit. His death having taken place during the pendency of this appeal the question of Janki Bai's right has become material. No doubt, the appellant has substituted one Narain a minor in place of Krishna Rao. But as a legal representative must continue the litigation on the cause of action sued upon and he cannot set up or agitate a new right of suit or his own individual right the decree may not necessarily enure for the benefit of Narayan or support his individual right, although if the former suit was a representative suit he may on the analogy of the rule enunciated by their Lordships of the Privy Council in *Mata Prasad* v. *Nageshar*

Sahai (1) get the benefit of the former decision on the abstract right of his family to officiate as *kamadar* of the appellant which may devolve on him as a member of that family under the terms of the *sanad*.

Then again Narain being a minor he would *prima facie* be considered disqualified like females for holding the office of a *kamadar*, which is necessarily a position of confidence and respectability, and ordinarily, none but an adult male could be considered fit to hold it. But it is just possible and there is room for assuming that the female heir or a minor heir may by virtue of a special custom or reservation of a right under the terms of the *sanad* be entitled to hold the office and nominate his deputy or substitute. It is, therefore, meet and proper that *Musammat* Janki Bai and the minor Narain should have an opportunity to prove that the office has rightly devolved on them or any of them and that the decree must, therefore, enure for their benefit also. In this view of the case, I do not see any necessity to consider the correctness or otherwise of the findings arrived at as regards the merits of the claim. The case is, therefore, remanded to the lower Court for enquiry and fresh decision with advertance to the above remarks and in accordance with law. The costs hitherto incurred including the costs of this appeal will abide the event.

G. R. D. *Case remanded.*

(1) 91 Ind. Cas. 370; 28 Bom. L. R. 1110; 3 O. W. N. 1; A. I. R. 1925 P. C. 272; L. R. 6 A. (P. C.) 195; 28 O. C. 352; 24 A. L. J. 1; 43 C. L. J 51; (1926) M. W. N. 83; 47 A. 883, 50 M. L. J. 18; 13 O. L. J. 19; 52 I. A. 398; 30 C. W. N 626 (P. C.).

ALLAHABAD HIGH COURT.
FULL BENCH.

SECOND CIVIL APPEAL NO. 1000 OF 1923.

July 27, 1926.

Present:—Sir Cecil Henry Walsh, KT., Acting Chief Justice, Mr. Justice Sulaiman, Mr. Justice Daniels, Mr. Justice Mukerji and Mr. Justice Boys.

GIRJA NANDAN THROUGH RAM SARUP—PLAINTIFF—APPELLANT

versus

HANUMAN DAS—DEFENDANT—RESPONDENT.

Transfer of Property (Amendment) Act (XXVII of 1926), whether retrospective—Interpretation of Statutes

Held, by the majority (*Walsh, A. C. J.*, and *Mukerji, J.*, dissenting).—That the Transfer of Property (Amendment) Act of 1926 is not retrospective in its nature so as to apply to documents executed prior to its coming into force. [p. 168, col. 2; p. 170, col. 1; p. 176, col. 2.]

Per *Walsh, A. C. J.*, and *Mukerji, J.*—That the Transfer of Property (Amendment) Act of 1926 is retrospective in its nature so as to apply to documents executed prior to its coming into force and it also affects litigants in a pending action who have obtained a decree by a Subordinate Court before the passing of the Act which decree is still under appeal. [p. 167, cols. 1 & 2; p. 173, col. 1.]

Per *Sulaiman, J.*—The preamble is merely a key to the construction of a Statute and it cannot control its substantive provisions, which may be found to extend beyond the limits of the preamble. [p. 168, col. 1.]

The form of an Act is by no means conclusive; an enactment may be declaratory in form but may be retrospective in its operation and *vice versa*. [*ibid.*]

Per *Daniels, J.*—An Act is not retrospective in its operation unless an intention to make it so clearly appears on its face. This rule does not apply to its full extent to matters of mere procedure, but where a Statute affects vested interests it is not to be construed retrospectively except where no other construction is admissible. [p. 169, col. 1.]

If an Act is purely declaratory, that is to say, if it enacts nothing new but merely the existing law, the ordinary rule of construction is that it applies equally to transactions prior to and subsequent to its coming into force. It is, however, necessary to look at the substance and not merely at the form of the Act. An Act may be in form an amending Act and yet when its operative provisions are examined it may turn out to be merely explanatory. On the other hand, an Act may be merely declaratory in form and yet may make a definite change in the law. [*ibid.*]

Where the Legislature inserts a new definition in an existing Act the effect of which is to define a term previously undefined, it would ordinarily be held that the definition was intended to be retrospective, more particularly when the preamble of the Act inserting it declared that it was expedient to explain the law but where the new definition has the effect of repealing a previously existing and inconsistent definition then in the absence of clear words showing the contrary intention the new definition will apply only from the date on which the new Act came into force and all documents executed prior to that date will be governed by the definition then in force. [p. 170, col. 1.]

Per *Mukerji, J.*—If the meaning of the Legislature is clear it is not open to the Courts to examine the previous law or the past history of it in order to find out the meaning of the words used. [p. 172, col. 1.]

Per *Boys, J.*—It is the universal practice when interpreting a new Act, any clause of which gives rise to any difficulty, to consider the Act whose place it takes. [p. 175, col. 1]

In the absence of anything decisive, it is undesirable to give a retrospective effect to an Act where to do so would be to alter the law applicable to a claim in litigation at the time when the Act was passed. [*ibid.*]

Second appeal from a decree of the District Judge, Gorakhpur, modifying that of the Subordinate Judge.

ORDER OF REFERENCE TO A FULL BENCH.

Sulaiman and Boys, JJ. (*June 25, 1926.*)—This is a plaintiff's appeal arising out of a suit for sale on the basis of a mortgage-deed, dated the 3rd of April, 1917, and presented for registration on the 24th of April, 1917. The suit was contested mainly by defendant No. 2 who held a mortgage, dated the 8th of April, 1917, and presented for registration on the 11th of April, 1917. The defendant pleaded that the plaintiff's mortgage-deed had been ante dated and was in fact subsequent to the defendant's mortgage. This point has been conclusively found against the defendant. He further denied the completion and validity of the document. The Court of first instance in a very summary judgment decreed the claim. On appeal the learned District Judge held that the plaintiff's mortgage-deed was defective for want of proper attestation. He held that it was executed in the presence of only one witness Baldeo at one place and then it was brought to the Court compound where it was attested by the second witness Kamla. Kamla was dead and could not be produced, but Baldeo was examined. The learned Judge felt inclined to assume that Kamla must have attested the document at the request and admission of the mortgagor. He, however, did not feel inclined to re-examine Baldeo because he was of opinion that even if Kamla had signed the document on the acknowledgment of the mortgagor, there was no proper attestation in law and the document created no charge on the property. He accordingly allowed the appeal by the contesting defendant and gave the plaintiff a mere simple money-decree against the mortgagor.

The plaintiff came up in appeal to this Court and a Bench of this Court came to the conclusion that the trial of the suit by the first Court had been unsatisfactory and that inasmuch as the pleas taken by the defendants were not quite express and clear, there was a possibility of the plaintiff having been prejudiced. This Court accordingly on the 23rd of March, 1926, sent down an issue whether or not the statutory provisions with regard to attestation had been duly complied with. Parties were given the opportunity to produce additional evidence if they chose. The finding now returned by the District Judge confirms what had been anticipated on the former occasion. It is found that Baldeo actually saw the executant sign the document, and attested it at one place; and later on at another place Kamla, the second witness, received an acknowledgment of the execution by the executant and then signed it.

There can be no doubt that under the ruling of their Lordships of the Privy Council in the case of *Shamu Patter* v. *Abdul Kadir Rowthan* (1) the signing of the document by Kamla was not a valid attestation. It has, however, been pressed before us that the effect of the new Act XXVII of 1926, is to make it a valid attestation.

In order to ascertain whether the new Act is a declaratory Act with retrospective effect so as to affect all documents executed prior to it, as well as all litigations pending at the time when it came into force, it would be necessary to examine the state of the law as it stood prior to the passing of this Act. Section 59 of the Transfer of Property Act (IV of 1869) required that a mortgage deed must be attested by at least two witnesses. The Legislature did not expressly define what the word "attested" meant. It left it to be understood in its ordinary meaning. On the other hand the Indian Succession Act (X of 1865), s. 50, expressly provided how the witnesses were to sign the document and made the receipt of a personal acknowledgment sufficient. This High Court in the case of *Sheikh Ghazi* v. *Bhawani Prasad* (2) and *Ganga Dei* v. *Shiam Sundar* (3) expressed the view that attestation in s. 59 of the Transfer of Property Act did not mean that the witnesses must actually see the executant sign the document, but that an acknowledgment by the executant was quite sufficient. On the other hand the view taken by the Calcutta High Court was that the word "attested" meant that the witnesses must be witnesses of the actual execution. *Girindra Nath Mukerjee* v. *Bejoy Gopal Mukerjee* (4) and *Abdul Karim* v. *Saliman* (5). The Madras High Court took the same view. *Shamu Patter* v. *Abdul Kadir Ravuthan* (6). The Bombay High Court in an earlier case,

(1) 16 Ind. Cas. 250; 35 M. 607; 16 C W. N. 1009; 23 M. L J. 321; 12 M. L. T. 338; (1912) M. W. N. 935; 10 A. L. J. 259; 14 Bom. L. R. 1034; 16 C. L. J. 596; 39 I. A. 218 (P. C.).

(2) A. W. N. (1896) 89.

(3) 26 A. 69; A. W. N. (1903) 201.

(4) 26 C. 246; 3 C. W. N. 84; 13 Ind. Dec. (N. S.) 732.

(5) 27 C. 190; 14 Ind. Dec. (N. S.) 125.

(6) 31 M. 215; 3 M. L. T. 300; 18 M. L. J. 219.

Ramji Haribhai v. *Bai Parvati* (7), took a contrary view holding that acknowledgment was sufficient. The same Court, however, in a later case, *Ranu* v. *Laxmanrao* (8), expressed the view that an attesting witness to a deed is a witness who has seen the deed executed, and who signs it as a witness. The Calcutta view was also followed by the Judicial Commissioner's Court in the Central Provinces. Thus prior to 1912 acknowledgment was deemed to be sufficient by this Court, but it was not considered sufficient by the other High Courts.

The Madras case went up in appeal before their Lordships of the Privy Council, who overruled the Allahabad cases and affirmed the Calcutta and the Madras view. *Shamu Patter* v. *Abdul Kadir Rowthan* (1). Their Lordships' decision is a clear pronouncement that the word "attested" in s. 59 of the Transfer of Property Act meant "the witnessing of the actual execution of the document by the person purporting to execute it." After this authoritative pronouncement of the highest tribunal, no doubt could remain as to the meaning of the section.

As, however, a contrary view had prevailed in this High Court, there were many creditors who had acted upon the rulings of this Court and had taken deeds signed by witnesses on mere acknowledgments. Such creditors were likely to be affected adversely. The Legislature recognised that so far as these provinces were concerned, there might be a great hardship although there might be no such hardship in the other provinces. Accordingly Act XXVI of 1917, called the Transfer of Property (Validating) Act, 1917, was passed. The professed object of this Act was to validate certain transfers of property made prior to the 1st of January, 1915, and the Act was to extend in the first instance to the United Provinces of Agra and Oudh only By s. 2 of the Act the Legislature validated instruments of mortgage or gift executed prior to the 1st of January, 1915, although they had been signed by witnesses without seeing the executant sign them, provided that such witnesses had before signing received from the executants personal acknowledgments of their signatures. Section 3 under certain circumstances allowed restoration of claims on documents prior to the 1st of January, 1915, which had been wholly or in part dismissed, rejected or withdrawn after the 30th of July, 1912, (the date of the judgment of their Lordships of the Privy Council) and before the commencement of the Validating Act. The passing of this Validating Act leaves no doubt in one's mind that the Legislature recognised that the documents not signed by the witnesses in the way in which their Lordships had ruled they ought to be, were invalid and that in order to remove the hardship which undoubtedly existed in these provinces it was necessary to validate such transfers. If in the opinion of the Legislature their Lordships of the Privy Council had committed a judiciary error in wrongly interpreting s. 59 of the Transfer of Property Act, it was not necessary to "validate transfers made prior to 1915." All that was necessary would have been to *declare* that they were not at all invalid. The further fact that that Act was confined in its operation to these provinces in the first instance and for a limited period makes it quite clear that the law as interpreted by the other High Courts and affirmed by the Privy Council was to be left unaltered unless the Governor-General by notification extended the operation of the Act to those provinces. It would thus seem that the effect of Act XXVI of 1917 was to recognise that the ruling of their Lordships of the Privy Council laid down the correct law, but it was considered advisable that that law should not be made applicable to certain transactions prior to 1915 which might have been entered into under a misapprehension of the law induced by the rulings of this Court.

As stated above, this Act was confined to these provinces and limited to a fixed period. All documents from the 1st of January, 1915, up to 1926; throughout the whole of India, were governed by the ruling of their Lordships of the Privy Council and could not be deemed to create a valid charge so as to pass interest in immoveable property unless the documents had been signed by at least two witnesses who had actually seen the execution.

One may ignore the historical fact that between 1917 and 1925 two attempts were made to get the Transfer of Property Act amended, but on some ground or other both the Bills were rejected. In March, 1925, a Bill which was the precursor of the present Act was introduced. One may again ignore the circumstance that there are differences

(7) 27 B. 91; 4 Bom. L. R. 869.
(8) 1 Ind. Cas. 464; 33 B. 44; 10 Bom. L. R. 943.

between the Bill as originally introduced and the Act as passed, and one must also ignore the statement of Objects and Reasons and the report of the Select Committee on the Bill. But the previous enactment of 1917 cannot be ignored when the retrospective nature of the new enactment has to be considered.

If the Legislature had intended to make the Act retrospective, there was nothing to prevent it from saying so expressly. There is no such express declaration. But the omission of such express declaration does not necessarily show that an Act is not retrospective. The preamble, however, undoubtedly favours the appellant. It says: "Whereas it is expedient to *explain* certain provisions of the Transfer of Property Act, 1882; it is hereby *enacted* as follows." The preamble is, no doubt, a key to the construction of the Statute, but it cannot, of course, control its provisions. *Nga Hoong* v *Queen* (9). The preamble may, therefore, suggest what the intention might have been but one has to see whether that intention has been carried out by the language of the Statute.

In declaratory Statutes one ordinarily finds the word "declared" and not only "enacted." But the omission of the word "declared" is by no means conclusive. Similarly the title of the Act, which is called the Transfer of Property (Amendment) Act, need not necessarily show that the previous law is sought to be amended. One may not attach any great importance to the circumstance that the Act did not come into force immediately when it was passed, but come into force on the 25th of March, 1926, when it received the assent of the Governor-General. But s. 2 does not merely provide that s. 59 of the Transfer of Property Act always had and has a particular meaning, or that it must be deemed to have that meaning. On the other hand an exhaustive and elaborate definition of "attestation" is laid down and the whole of that definition is to be "inserted" in s. 3 of the Transfer of Property Act. For a declaratory Act all that is necessary is to declare what the law is and not to amend the Act by introducing into one of its sections certain new words.

The body of the Act is thus not quite in harmony with the preamble. In order, therefore, to decide whether the Act must be taken to have a retrospective effect it is necessary to take into account a number of other considerations. Had it embodied a mere rule of procedure, there would perhaps have been no difficulty. But the law requiring how a transfer of immoveable property by mortgage can be effected is not a mere rule of evidence. The provisions are mandatory and imperative. Without registration and without proper attestation there is no transfer of immovable property at all.

Under a Statute of 1696 it was necessary in Scotland that where a deed consists of more than one page, each page should be attested in the same manner by the grantor with his usual and accustomed form of signature. An agreement for a lease was executed in 1873, written on seven pages, of which only the last page was signed in full, the remaining pages being only initialled. The Conveyancing Act of 1874, s. 39, provided: "No deed, instrument, or writing subscribed by the grantor or maker thereof, and bearing to be attested by two witnesses subscribing, and whether relating to land or not, shall be deemed invalid or denied effect according to its legal import because of any informality of execution." The question arose whether this Act had restrospective effect so as to validate the previous agreement. The House of Lords in *Gardner* v. *Lucas* (10) held that it did not. Lord Cairns, L.C., at page 593* remarked: "If the construction contended for by the appellant is correct the consequence is that this section, by words which at the outset are ambiguous, must have the effect of bringing again into existence, without limit as to time, every instrument which had failed of validity, which had failed to come into existence, by want of compliance with the formalities of the Act of 1696, and must have the effect of setting up every such instrument notwithstanding the titles and the arrangements of property which might have been made upon an assumption that those instruments were absolutety invalid." Lord O'Hagan at page 601* observed: "There are cases,—English cases, and I believe Scotch cases also,—which take a clear distinction between matters of procedure and matters of right, as to the operation of a Statute prospectively or retrospectively. In the case before your Lordships the matter is of a

(9) 7 M. I. A. 72; 4 W. R. P. C. 109; Boul. 189; 1 Suth. P. C. J. 285; 1 Sur. P. C. J. 598; 19 E. R. 237.

(10) (1878) 3 A. C. 582.

*Pages of (1878) 3 A. C.—[*Ed.*]

right created by a deed, and unless the execution of that deed fulfil the conditions prescribed by the Legislature no right exists under it." Lord Blackburn, at page 603*, said: "But where the effect would be to alter a transaction already entered into, where it would be to make that valid which was previously invalid—to make an instrument which had no effect at all, and from which the party was at liberty to depart as long as he pleased, binding—I think the *prima facie* construction of the Act is that it is not to be retrospective, and it would require strong reasons to show that is not the case."

The next point to consider is whether by giving the Act a retrospective effect, vested rights would be interfered with or not for it is well settled that where vested rights are to be adversely affected, the strongest presumption, in the absence of clear and express words, is that an Act is not retrospective. There may be in existence thousands of documents throughout India which though purporting to be a mortgage-deed are not a mortgage-deed for want of proper attestation, and create no charge whatsoever on any immovable property. All subsequent mortgagees have, therefore, a vested interest to claim priority as against such creditors and are entitled to enforce their claims in preference to them. Many of these might in fact have advanced money to borrowers after having ascertained that the previous documents executed by them create no valid encumbrance on the property at all. Could the Legislature have intended by one stroke of Legislation to destroy the priority of all such subsequent transferees and bring into existence a valid transfer in favour of a previous creditor, who before the Act could not be held to have any interest in the eye of the law? In the words of Lord O'Hagan in *Gardner* v. *Lucas* (10) "Can we suppose that in that year (1876), no right existing, as the conditions of a valid execution had not been fulfilled, the Legislature intervened, and by equivocal words, without any expression of clear intention, and in direct opposition apparently to public policy and private interest, established a right that never before had any existence?.....A man who, on the faith of the construction which, as I think, must now be taken to be correct, had advanced a large sum of money on a purchase would, if the view of the appellants were adopted, be deprived of all his outlay. .....The vested interests are those of a man who, acting upon the law as he understands it, and as it really turns out to be, has advanced his money or changed his position; and it cannot be said that in these circumstances such interests do not deserve protection." The case before us is a case in point. Under the law, as it stood when the District Judge passed his decree, Hanuman Das, though a subsequent creditor, had the first charge on the property, and Girjanandan had no charge whatsoever. Even if on the 23rd of March 1926, instead of remanding an issue this Court had accepted what the District Judge had anticipated and which has now been found to be the fact, the lower Appellate Court's decree would have been upheld. Could the Legislature have intended that because the amending Act came into force between the remand and the return of the finding, Hanuman Das is to lose his priority and Girjanadan is to acquire an interest in the property which he did not possess before? The position of the creditors in the other provinces might well be worse inasmuch as the law as interpreted by the Privy Council was in no way different from that which had been administered by the High Courts there. Are all such transferees to lose their first charge on the property because the new Act would make documents mortgage-deeds which were not understood to be such before? In view of these circumstances and the fact that the correctness of the Privy Council ruling was acted upon if not expressly accepted, in 1917, one might have some hesitation in holding that the present case is governed by the new Act.

The learned Vakil for the appellant has, however, brought to our notice the judgment in *Mohammadi Bibi* v. *Kashi Upadhya* (11) decided on the 1st June, 1926, in which it was held that the new Act was retrospective in its effect and governs previous transaction. The judgment does not show whether the significance of the Validating Act of 1917 was pressed before the Bench. Nor does it show that the possibility of the new Act affecting vested rights was argued. The judgment is based on the view that the Act is a declaratory Act because it was an Act "to remove doubts existing as to the meaning or effect of a Statute." It may in the first place be pointed out that

*Page of 1878 3 A. C.—[*Ed.*]

(11) 96 Ind. Cas. 775; A. I. R. 1926 All. 725.

it could hardly be said that a doubt existed when the highest tribunal had made a final pronouncement and itself acted upon it in subsequent cases. It might not be, in the second place, quite correct to say that all Acts which are passed in order to "remove doubts" do necessarily have a retrospective effect. Act VI of 1913 was intended to declare the rights of Musalmans to make settlement, and the preamble of it stated "Whereas doubts have arisen regarding the validity of *wakfs*, etc., and whereas it is expedient to remove such doubts, it is hereby enacted as follows."

Section 4 used the language "No such *wakf* shall be *deemed* to be invalid, etc., etc." Although it is the declared policy of the Government not to alter the Muhammadan Law as to gifts and *wakfs*, all the Courts in India held that the said Act was not declaratory and retrospective in its effect but enacted a new rule of Muhammadan Law. This position was assumed to be correct by their Lordships of the Privy Council in the case of *Ramanadan Chettiar* v. *Vava Levvai Marakayar* (12). And this view was followed by this Court in the case of *Niamul Haq* v. *Mohammad Subhanul lah* (13).

It may further be said that even declaratory Acts might not have such a wide retrospective effect as to cover all past transactions. An Act which declares a certain matter to be an offence even if it were to rectify a judicial error, could hardly be held to have retrospective effect so as to make a previous act committed at the time when the law was differently understood, a punishable offence It might also be conceivable that although an Act is made declaratory in its nature, it will not affect people who have acquired vested rights and who would be affected adversely by it.

That a retrospective operation ought not to be given to a Statute "unless the intention of the Legislature that it should be so construed is expressed in plain and unambiguous language" is made clear by the case of *Young* v. *Adams* (14) decided by the Judicial Committee of the Privy Council. Their Lordships had in a previous case held that the power generally possessed by the Crown to dismiss a civil officer in New South Wales at pleasure was restricted by the provisions of the Civil Service Act, 1884, and that the Government had no power to dismiss a civil servant except on the grounds, and after the enquiry, which that Statute prescribed. A subsequent Act called the Public Service Act of 1895 was passed, s. 58 of which provided, "Nothing in this Act or in the Civil Service Act of 1884, shall be construed or held to abrogate and restrict the right of the Crown *as it existed before* the passing of the said Civil Service Act to dispense with the services of any person employed in the public service". It was held that the later Act had not a retrospective effect. Lord Watson in delivering the judgment of the Judicial Committee remarked at page 474*. "It may be true that the enactments are declaratory in form; but it does not necessarily follow that they are, therefore, retrospective in their operation, and were meant to apply to acts which had been completed or to interests which had vested before they became law. Neither the context of the Statute, nor the terms of the clause itself, appear to their Lordships to favour that result." At page 476* his Lordship remarked: "It does not seem to be very probable that the Legislature should intend to extinguish, by means of retrospective enactment, rights and interests which might have already vested."

There is one more consideration which cannot be lost sight of. If the new Act is to be retrospective then the provision in s. 2 requiring that each of the witnesses must sign the instrument *in the presence of* the executant must also have a retrospective effect. With the exception of a stray remark in the case of *Ramji Haribhai* v. *Bai Parvati* (7) we are not aware of any reported case in which it has been expressly held that the witnesses must actually sign the document in the presence of the executant. Even the two Allahabad cases did not go to the length of expressly holding that attestation within the meaning of s. 59 of the Transfer of Property Act meant that all that was required by s. 50 of the Indian Succession Act should be done. When their Lordships of the Privy Council sent down an issue in the case of *Padarath*

(12) 39 Ind. Cas 235; 15 A. L. J. 139; 32 M. L. J. 101; 5 L. W 293; 1917 M. W. N. 180; 25 C. L J. 224; 21 M. L. T. 215; 21 C. W. N. 521; 40 M. 116; 1 P. L. W. 394; 19 Bom. L. R. 401; 44 I. A. 21 (P. C.).

(13) 48 Ind. Cas. 94; 41 A. 1; 16 A. L. J. 841.

(14) (1898) A. C. 469; 67 L. J. P. C. 75; 78 L. T. 506; 14 T. L. R. 373.

*Pages of (1898) A. C.—[*Ed.*]

Halwai v. *Ram Narain Upadhia* (15) there was no direction to enquire whether the famale executants also saw the witnesses sign the documents. There may be hundreds of documents executed by *pardanashin* ladies, bed-ridden patients or blind persons which have been signed by the executants in the presence of the witnesses in one room and the witnesses have put their signatures in an adjoining room not seen by the executants. All such deeds of mortgage and gift would have to be wholly invalid although there has so far been no clear reported authority indicating that this must be so. To give the section a restrospective effect might hit hard transferees under such documents.

In view of all these points which deserve consideration, and in view of the wide effect which the interpretation of this new Act is likely to have on all transactions since 1915 entered into throughout India, it seems desirable that there should be an authoritative pronouncement by a Full Bench. We would accordingly refer the following two points to a Full Bench for decision:

(1) Whether Act XXVII of 1926 is retrospective in its nature so as to apply to documents executed prior to its coming into force?

(2) If so, whether it would also affect litigants in pending actions who have obtained a decree from a Subordinate Court before the passing of the Act, but the decree is still under appeal.

Mr. *Haribans Sahai*, for the Appellant.

Mr. *Shiva Prasad Sinha*, for the Respondent.

JUDGMENTS OF THE FULL BENCH.

Walsh, J.—I am unfortunately unable to agree with the view taken by the majority of the Court in this case. The question referred is whether Act XXVII of 1926 applies to documents prior to the Act coming into force. A secondary question arises whether it applies in the hearing of an appeal from a decree passed before the Act.

In my opinion the questions permit of only one answer. The preamble to the Act says it is expedient to explain certain provisions of the Transfer of Property Act, 1882. It enacts that in s. 3 of that Act, after the definition of the word "instrument" the following shall be inserted, namely, "attested" in relation to an instrument means and then follows the interpretation to be put upon the word "attest."

I read this to be statutory instruction to every body who is bound by the Statute and to the Courts, to interpret the word "attested" in the sense provided whenever it has to be interpreted. The Act came into force on the 25th of March, 1926, and from that date every Court was bound by the Statute whenever it has to consider the meaning of the word "attested" in relation to any instrument to which the Act applies. There is no language qualifying or limiting the instrument to which the Act applies. If it was intended to limit it was necessary to do it by express language having regard to the generality of the language which I have quoted.

It is clear that if a certain view of the law is changed by the decision of a superior authority, for example, if any decision of the Allahabad High Court is overruled in the Privy Council, pending an appeal in another case, the Allahabad High Court would have to apply the changed view in obedience to the authority of the Privy Council in spite of the fact that the decision of the lower Court was right when it was given in following the old decision. It seems to me incongruous that an Appellate Court should be bound to effect this result whatever the consequence to the parties in the case of a decision given for the first time by a superior authority and should hold itself not so bound in the case of a statutory definition given for the first time by the legislation. With all respect I regard the considerations set out in the referring order as beside the question, having regard to the plain language and simple direction contained in the Act now under consideration.

The case seems to me to be analogous to that decided by the Divisional Court in England in *Attorney-General* v. *Theobald* (16). In that case there was previous legislation imposing stamp duty upon personal property passing under a voluntary settlement. A subsequent Act enacted that the expression "voluntary settlement" should be construed in a particular way. It was held that the earlier Act must be read as having the meaning declared by the later Act. The duty imposed upon the Court by the Statute must be discharged from the moment

(15) 30 Ind. Cas. 366; 37 A. 474; 13 A. L. J. 809; 19 C. W. N. 991; 17 Bom. L. R. 617; 18 M. L. T. 85; 2 L. W. 639; 29 M. L. J. 159; 22 C. L. J. 165; (1915) M. W. N. 709; 42 I. A. 163 (P. C.).

(16) (1890) 24 Q. B. D. 557; 62 L. T. 768; 38 W. R. 527.

when the Statute becomes law without reference to the date of the instrument. Where the meaning is plain we have nothing to do with the consequence.

Sulaiman, J.—The arguments for and against the view that Act XXVII of 1926 is retrospective in its nature are set forth at some length in the order of reference. It is, therefore, unnecessary for me to repeat them in detail.

The strong point in favour of the plaintiff-appellant is that the preamble of the Act contains the expression "to explain certain provisions of the Transfer of Property Act, 1882" and s. 2 of the Act defines what the word 'attested' means. The preamble standing by itself undoubtedly gives an indication that nothing new was being enacted but only the meaning was being explained. But the preamble is merely a key to the construction of a Statute and it cannot control its substantive provisions, which may be found to extend beyond the limits of the preamble. *Nga Hoong* v. *Queen* (9). The law requiring how a document is to be completed is not a mere rule of procedure but a substantive provision. *Gardner* v. *Lucas* (10). Without proper attestation no charge on immoveable property is at all created. If the Act of 1926 is to be held retrospective in its operation so as to take effect from 1882 vested rights would be affected throughout India. There is, therefore, a very strong presumption against its retrospective nature unless the language employed is 'plain and unambiguous'. The form of an Act is by no means conclusive. An enactment may be declaratory in form but may not be retrospective in its operation. *Young* v. *Adams* (14).

The Act is called the Transfer of Property (Amendment) Act and did not come into force with effect from the date when it was passed but like many other Acts from the date when it received the assent of the Governor-General. It does not expressly say that it will be retrospective and will apply to all previous transactions. Section 2 does not merely declare what has always been the meaning of the word 'attested' but an elaborate definition is to be inserted in s. 3 of the Transfer of Property Act. That definition certainly goes much further than the ordinary meaning of attested as given by their Lordships of the Privy Council, *Shamu Pattar* v. *Abdul Kadir Rowthan* (1). After the pronouncement of the highest tribunal, it could hardly be said that any doubt remained as to its meaning requiring an explanation. None such doubt could certainly remain after the Legislature itself, by the enactment of Act XXVI of 1917, recognised the correctness of their Lordships' ruling and found it necessary to validate transfers prior to 1915 in these provinces leaving the law intact in the other provinces and for the subsequent period. If in the opinion of the Legislature their Lordships had committed a judicial error all that was necessary was to rectify that error and not to validate certain specified transfers only.

If the word 'explain' were not in the preamble, every one would probably have agreed that the Act was only prospective. If the Act of 1917 were not in the way, I would certainly have held the new Act to be retrospective. One course is to ignore altogether the effect of the Act of 1917 and attach so much weight to the preamble of the new Act as to make it conclusive and to govern absolutely its substantive provisions. The other course is to admit that the Legislature itself in 1917 accepted the law as laid down by their Lordships to be correct, and then to hold that the Act in reality alters that law, and, therefore, goes beyond the preamble, in which case it cannot be retrospective.

The point itself is a difficult one and the difficulty is enhanced all the more by reason of a difference of opinion. On the whole, I am still impressed more by the doubts expressed in the referring order against the retrospective operation of the Act and, therefore, agree with my learned brothers Daniels and Boys, JJ., in answering the first question in the negative.

Daniels, J.—The questions referred for the decision of the Full Bench are:—

1. Whether Act XXVII of 1926 is retrospective in its nature so as to apply to documents executed prior to its coming into force?

2. If so, whether it would also affect litigants in pending actions who have obtained a decree by a subordinate Court before the passing of the Act, but the decree is still under appeal.

The second question only arises in the event of the first question being answered in the affirmative.

Act XXVII of 1926 came into force under the provision of s. 5 of the General

Clauses Act, 1897, on 25th March, 1926, on which date it received the assent of the Governor-General. The document in suit was executed on 3rd April, 1917, nearly nine years earlier. It was a mortgage-deed requiring attestation by two witnesses to give it validity under the provisions of s. 59 of the Transfer of Property Act. It has been found that only one of the attesting witnesses saw the executant put his mark to the deed. The other attested it on an acknowledgment by the executant of the deed of his having executed it. Both witnesses attested the deed in presence of the executant. If Act XXVII of 1926 applies to the deed, this was a valid attestation. Under the law in force at the time, as laid down by the Privy Council in *Shamu Patter* v. *Abdul Kadir Rowther* (1) it was not a valid attestation.

The first question turns on whether Act XXVII of 1926 is a purely declaratory Act or not. If an Act is purely declaratory, that is to say, if it enacts nothing new but merely explains the existing law, the ordinary rule of construction is that it applies equally to transactions prior to and subsequent to its coming into force. *Attorney-General* v. *Theobald* (16). It is, however, necessary to look at the substance and not merely at the form. An Act may be in form an amending Act and yet when its operative provisions are examined it may turn out to be merely explanatory. That was the case in *Attorney-General* v. *Theobald* (16). On the other hand an Act may be merely declaratory in form and yet may make a definite change in the law. The Musalman Waqf Validating Act of 1913 was an Act of this kind. The preamble recites that it has been enacted in order to remove doubts which have arisen regarding the validity of certain *waqfs* created by Musalmans. Yet the Act has been held not only by this Court, but also by the Privy Council to be prospective and not retrospective in its operation. Such an Act comes under the ordinary rules that an Act is not retrospective in its operation unless an intention to make it so clearly appears on its face. The rule does not apply to its full extent to matters of mere procedure, but where a Statute affects vested interests it is not to be construed retrospectively except where no other construction is admissible. *Gardner* v. *Lucas* (10) and *Young* v. *Adams* (14). It is unnecessary to labour the point that the Act of 1926, if retrospective, does affect vested rights to a very serious extent. Rights in property have grown up all over India on the basis of the definition of attestation laid down by the Privy Council in *Shamu Patter's case* (1) and accepted by the Legislature in Act XXVI of 1917 which will be unsettled and in many cases destroyed if Act XXVII of 1926 is held to apply to them.

The present is exactly the contrary case to that which came before the Courts in *Attorney-General* v. *Theobald* (16). In that case the Act to be construed was amending in form but declaratory in substance. In the present case the Act is declaratory in form but amending in substance. If nothing had occurred beyond the decision of the Privy Council in *Shamu Patter's case* (1) it might be said that the Legislature intended to declare that decision to be incorrect. The matter did not, however, rest there. The Indian Legislature by Act XXVI of 1917 accepted and embodied in an Act of the Legislature the interpretation put by the Privy Council on the word "attest". The Act in question is described as the Transfer of Property (Validating) Act, 1917. It applied only to the United Provinces of Agra and Oudh, and only to those instruments executed prior to the 1st of January, 1915. Within this limited area and this limited period of time it allowed validity to documents attested by persons who did not see the executant sign them provided the attesting witness had received an acknowledgment of execution from the executant. It follows necessarily from this enactment on the principle of *inclusio unius est exclusio alterius* that in all other parts of India and for all documents executed after the 1st of January, 1915, no attestation was valid unless both the attesting witnesses had seen the executant sign the deed. This law has now been changed by the recent Act. It does not matter that the preamble declares an intention of explaining the law or that the change is made by the insertion of a new definition. The preamble may be used to gather the intention of the Act in doubtful cases but it can under no circumstances control the substantive provisions of the Act. If we find as we find here, that the Act lays down a new provision inconsistent not merely with the interpretation placed on the word "attest",

by the Court but with the interpretation accepted by the Legislature itself in Act XXVI of 1917, we are bound to hold and we do hold that it is not merely a declaratory Act but effects a change in the substantive law and as there is nothing in the Act from which an intention to make it retrospective can be clearly inferred, it must be treated as applying only to instruments executed after its commencement.

Where the Legislature inserts a new definition in an existing Act the effect of which is to define a term previously undefined, it would ordinarily be held that the definition was intended to be retrospective, more particularly when the preamble of the Act inserting it declared that it was expedient to explain the law but where the new definition has the effect of repealing a previously existing and inconsistent definition then in the absence of clear words showing the contrary intention the new definition will apply only from the date on which the new Act came into force and all documents executed prior to that date will be governed by the definition then in force. This is substantially the position here. The Act of 1917 did not in terms define the word "attest" but it enacted expressly that for documents executed in the United Provinces prior to 1917 the word "attest" did not require that both attesting witnesses should have seen the executant sign and by necessary implication that in all other parts of India and for all subsequent documents it was necessary that they should have done so. The definition so enacted has now been substantially modified and as the Legislature has not declared that the modification shall be retrospective the ordinary rule applies that the new definition governs only documents executed after it came into force.

My answer to the first question, therefore, is that Act XXVII of 1926 is not retrospective so as to apply to documents executed prior to its coming into force.

In view of this answer the second question does not arise.

Mukerji, J.—This is a Reference to a Full Bench by two learned Judges of this Court for its decision on two questions to be stated presently. As usual the Reference to Full Bench has been due to a difference of opinion between the learned Judges who made the reference and two other learned Judges who decided the case of *Mohammadi Bibi* v. *Kashi Upadhiya*(11) on the 1st June, 19 6. One of the questions referred to the Full Bench is a rather difficult one. It is a matter of pure accident that while both the learned Judges who made the reference are on the Full Bench and are in a position to represent their views, none of the Judges who decided the case of *Mohammadi Bibi* v. *Kashi Upadhya*(11) are here to represent their views of the case. I, therefore, sought an opportunity of consulting one of the learned Judges who decided the aforesaid second appeal.

The facts which led up to the reference are very briefly these. The appellant before this Court instituted the suit out of which this appeal has arisen on foot of a mortgage-bond, dated the 3rd of April, 1917. The suit was contested principally by a second mortgagee who holds a mortgage, dated the 8th of April, 1917. The main point of contention was that the plaintiff's mortgage was not a valid mortgage under s. 59 of the Transfer of Property Act inasmuch as both the attesting witnesses to it did not see the executant sign his name on the bond. It has been found that while one of the marginal witnesses saw the execution the other put his signature on the document on receiving a personal acknowledgment from the executant of the execution. It is contended for the second mortgagee that in the circumstances of the case the mortgage of the 3rd of April, 1917, is not a valid mortgage.

The learned Judges who decided the case of *Mohammadi Bibi* v. *Kashi Upadhya* (11) were of opinion that the amendment of the Transfer of Property Act made by Act XXVII of 1926 would validate the mortgage in question although the Act was passed nine years after the execution of the mortgage-deed. The learned Judges who made the reference were inclined to disagree with this view and hence this reference. Of course, the two learned Judges making the reference did not definitely commit themselves to the view they expressed in the order of reference and it cannot be said that there is, actually, at this moment a difference of opinion in the High Court.

The questions referred to Full Bench are:—

1. Whether Act XXVII of 1926 is retrospective in its nature so as to apply to documents executed prior to its coming into force?

2. If so, whether it would also affect

litigants in pending actions who have obtained a decree by a subordinate Court before the passing of the Act but the decree is still under appeal?

Point No. 1—The Transfer of Property Act did not originally contain any definition of the word "attested" although it required that a deed of mortgage and a deed of gift should be attested by at least two witnesses. For want of definition of the word "attested" there arose a difference of opinion among the High Courts in India as to its meaning. Except the Allahabad High Court all other High Courts held that "attested" meant that the two witnesses required to "attest" should be present when the executant signed the document and should, therefore, see him actually sign it. The difference of opinion was set at rest when the Privy Council decided in view of the majority of the High Courts. As the opinion of the Allahabad High Court had been entertained for a long time and as it was feared that many transactions had been entered into on faith of the view expressed in Allahabad, the Act XXVI of 1917 was passed to validate such of the documents that may have been executed prior to 1st January, 1915, in the United Provinces of Agra and Oudh. It was then that the Legislature in a way signified its approval of the interpretation put by the Privy Council on the word "attested."

Then came the Act XXVII of 1926, passed ostensibly with a view to explain what was meant by the word "attested" as used in the Transfer of Property Act.

The question that arises is whether this definition should have effect from the date the Act XXVII of 1926, received the assent of the Governor-General, *viz.*, 25th March, 1926, or whether it should be read as having a retrospective effect.

It is clear that the mere form in which an Act is passed is not conclusive as to whether its application is to be in the future or it has a retrospective effect. On the other hand, it is also recognised that ordinarily a declaratory Act is supposed to have a retrospective effect unless the contrary intention is clearly expressed in the body of the Act. The preamble, therefore, is only a guide to the intention of the Legislature but it is not an infallible guide. The preamble in this case states that the Legislature thought it expedient to explain what was meant by the word "attested" as used in the Transfer of Property Act. When you attempt to explain a certain word already used by the Legislature in an enactment you assume that the meaning which you are going to put always existed there and that you are doing nothing to alter the meaning borne by the word. The preamble, therefore, on the face of it professes only to tell us what the word "attested" meant *since the passing of the Act* in 1882. Coupled with this avowed intention of the Legislature to do nothing but to explain the meaning of an already exisiting word there comes the definition of the word "attested." In defining the word, the Legislature desires that the definition should be simply "inserted" in the Act. The effect would be as if the Act had all along contained the definition since its promulgation. This "insertion" of the definition would again point to the view that the Legislature meant only to "explain" the meaning of the word "attested" and did not profess to express the intention that the meaning was to be attached only to documents executed after the Act came into force and not to those that were executed before that. Further let us examine the definition itself. It runs as follows:—"Attested in relation to an instrument means attested, etc....." The use of the word "means" again, in my opinion indicates that the Legislature tells us that it wishes the word "attested" to bear a certain meaning without any reference to the date of the passing of the Act of 1926. When you say that a particular word already used by a Legislature means something you intend to say that that is the meaning which the word has always borne and should be interpreted as if the meaning attached to the word since the time of its first use (in 1882). Such being, therefore, the grammatical construction of the several words used in the enactment of 1926, it seems to me clear that the Act is a pure declaratory one and has a retrospective effect.

On the other hand, it has been said that from the words "expedient to explain" it cannot be inferred that the Legislature really meant to say that they themselves believe that the word "attested" has always borne the meaning which the Legislature wanted it to bear by enacting Act XXVII of 1926. I recognise the full validity of this argument. I have already indicated that by passing Act XXVI of 1917 the Legislature of the time accepted the interpretation

put by the Privy Council on the word "attested" and having done so thought it was necessary to validate such documents as may have been executed on faith of a different interpretation. But it seems to me to be equally clear that the Legislature not only wanted that the interpretation as adopted by the Privy Council should be changed but also that it should change with effect from the date of the passing of the Transfer of Property Act. The words "whereas it is expedient to explain" were adopted not by way of telling a falsehood to the public at large but simply because those words were calculated by use of as few words as possible to serve the purpose which the Legislature had in view. An enactment never contains a discussion of the reasons as to why it was passed. Some times it is necessary to say a few words by way of an introduction to express the intention of the Act and that is why the "preamble" becomes necessary. The Legislature did not owe any explanation to anybody as to why they were altering the law. They thought it was enough to use words which would indicate their intention. If the words used clearly indicate the intention, I think it is beyond the province of the Courts to scrutinise the motive. I fully recognise that the interpretation of the word "attested" had been definitely settled by the Legislature of 1917 in a particular way. It is also clear that in 1926 the Legislature wanted to widen the interpretation and to include certain methods of attestation which were not previously recognised. In other words the Legislature did mean to alter the law. The only question is whether they meant to alter it for the future or whether they meant to alter it also with a view to affect the documents already executed before 25th March, 1926. The intention of the Legislature is to be gathered usually not from the history of past legislation but from the language employed in the Act itself and from that alone, where that intention is clear.

In the view I take of the language used in Act XXVII of 1926 no room is left in my mind to doubt that the Legislature meant to give the Act a retrospective effect. I have already stated that if the meaning of the Legislature be clear it is not open to Courts to examine the previous law or the past history of it in order to find out the meaning of the word used. In my opinion it is clear that the Legislature meant by using words of that implication that the Act should have a retrospective effect and it is not, therefore, necessary to pry into the reasons for this enactment. But it is not at all difficult to see why the Act should have been given a retrospective effect. In a country like India where the number of illiterate people exceeds 90 per cent., an enactment like ss. 59 and 123 of the Transfer of Property Act is always a source of distress. People are not accustomed to technicalities like the attestation of a document and it was believed that in spite of the fact that the word "attested" had been interpreted in a particular way for the last 44 years hardships were still caused by that interpretation. The object, therefore, was to widen the sense of the word "attested" without impairing to any great extent, the usefulness of the rule laid down in ss. 59 and 123 of the Act. It is true that the giving of the retrospective effect was likely to affect some subsequent transferees by depriving them of such advantage as they might secure by establishing it in a Court of law, that a document having priority in date was not a properly drawn up one. But such advantages could hardly be called "fair" advantages. For example, in this very case the plaintiff's mortgage was executed for consideration and in good faith. The subsequent mortgagee wants to take advantage of the fact that there is a technical flaw. If, by the passing of the Act of 1926, such advantage is denied to the subsequent mortgagee nobody need be sorry for that. It has been hinted that the definition of the word "attested" not only widens the previous law but also alters it in a material way. I do not think that it has any such effect. In my opinion all the documents that may have been executed strictly in accordance with the interpretation of the word "attested" as given to the word by the Privy Council, will continue to be valid under the present definition: they will not be affected. The words in the definition "and each of whom has signed the instrument in the presence of the executant" do not necessarily mean that the executant should see the witnesses sign. If a *pardanashin* lady signs a mortgage by way of executing it in the presence of two witnesses and if the witnesses then and there sign the document by way of attestation, the mortgage will be good enough within the definition of the word "attested," because the witnesses have signed in the presence of the executant

though it may be that they have not signed in the view of her.

For reasons given above I am of opinion that the answer to both the questions referred to us should be given in the affirmative.

Boys, J.—The main question and in view of the opinion at which I have arrived, the only question is whether Act XXVII of 1926 is retrospective?

The facts are fully stated in the judgment of my learned brother Mr. Justice Mukerji. Mr. Justice Sulaiman discussed the matter very fully in our referring order, with which, of course, I was in agreement, and I have heard nothing during the course of the argument and subsequent discussion of this case to lead me to alter my views. Adopting, therefore, the reason already stated in that referring order I will confine myself as far as possible to certain further general considerations.

It is accepted that each Act must be judged by its own language and surrounding circumstances. As regards the permissibility of looking at these latter I am aware that doubt has been expressed by one of us but I shall refer later to authority establishing that it is permissible to consider some of the circumstances in which a particular Act was passed.

While each Act must be judged by its own language and circumstances there are certain broad principles to which I shall refer. Before, however, mentioning those I note that there are two outstanding features about this short Act; firstly, that the preamble states that in the opinion of the Legislature it was "expedient" to "explain" certain provisions of the Transfer of Property Act, 1882. Secondly, it is hereby enacted as follows and then follows the insertion of a definition. That definition is to be "inserted" in the Act of 1882 after the definition of the word "instrument." I am unable to attach any particular weight to the word "inserted". This is a word equally applicable to an Act intended to be retrospective or to an Act which may be in accordance with ordinary presumption assumed to be prospective. Every amending Act contains the expressions "shall be inserted" and "shall be added"; sometimes the one and sometimes the other phrase is used, appropriately to the nature of the alteration.

Similarly I am unable to attach any particular force to the word "means." It is equally used in all kinds of Acts in reference to definition: whether those definitions are in an original or in an amending Act; it is just the ordinary word appropriate to a definition.

Nor am I able to attach any weight to the words "any instrument." They are capable standing by themselves of including any instrument executed in the past as well as those to be executed in the future or of being confined to instruments executed in the past, or of being confined to instruments executed in the future according to the context and the nature of the Act. To assume that those words have any one or other of these three meanings appears to me to assume the answer to the question which we have to decide and to wholly deny effect to all the approved broad principles of interpretation of Statutes.

Judging then the operative clause of the Act by itself and as it stands, I can find nothing to differentiate it from any similar clause that might be found in any Act appearing on the Statute Book for the first time.

Regarding the Act as a whole the single feature which suggests that the Act is retrospective and the only fact which has given rise to doubt is to be found in the existence in the preamble of the words "to explain". In reference to this two generally accepted propositions may be stated. Firstly, the preamble can only affect interpretation of an operative clause where that operative clause is *in itself* of doubtful import. Secondly, the form of an Act is not conclusive in determining the question we have to decide. This point has been dealt with by my brother Mr. Justice Daniels with whose expression of his views I entirely concur. I would add here some comments on the case with which he deals. *Attorney-General* v. *Theobald* (16). In that case Pollock, B., after pointing out that "each case must, however, depend upon the language of the particular Statute and to some extent, on the subject-matter to which the Statute applies" added "these words 'voluntary settlement' *having given rise to doubts*, the Legislature passed an Act, etc." I shall note later on that at the time of passing the Act XXVII of 1926 there were no doubts of any sort whatever existing in the mind of any body as to what the current authoritative interpretation of the law then was. These considerations together with those adverted to by my

brother Mr. Justice Daniels suggest to my mind that this case is not authority for the proposition that the Act we are considering is not retrospective but rather the converse.

It was suggested during the course of the argument that we are as much bound by a declaration of the Legislature affecting past transactions as we are bound by a judgment in regard to such transactions of their Lordships of the Privy Council. That is, of course, a proposition beyond dispute, but it again appears to me to assume the answer to the very question which we have to decide. If the Statute is retrospective there can be no question but that we are bound to give effect to it. But we have to determine this very question whether it is or it is not retrospective. Herein lies a difference between Statutes and the judgments of a superior Tribunal. The latter are *never* confined to declaring what the law is to be in the future. The effect is always to declare what the law now is and has been in the past; in other words, such judgments are always declaratory and retrospective as well as prospective.

It would seem to be clear that none of the general tests which has been accepted in aid of the determination of the question whether an Act is retrospective or not is by itself conclusive. But that does not mean, of course, that such tests are of no value and I will proceed to refer to some of them.

That the form of an Act is not conclusive is clear not only from the case already referred to, *Attorney-General* v. *Theobald* (16) and other cases, but was very specifically asserted in *Young* v. *Adams* (14) where Lord Watson said: "It may be true that the enactments are declaratory in form; but it does not necessarily follow that they are, therefore, retrospective in their operation, and were meant to apply to acts which had been completed or to interests which had vested before they became law."

It is conceded on all sides that the initial presumption is that an Act is not retrospective. In *Modern Railway Co.* v. *Pye* (17) Early, C. J., said: "Those whose duty it is to administer the law very properly guard against giving to an Act of Parliament a retrospective operation unless the intention of the Legislature that it should be so construed is expressed in *clear, plain and unambiguous language.*" It is unnecessary to multiply authority for this proposition but it may be noted that it was applied by their Lordships of the Privy Council, to whose authority we are particularly subject, in *Muhammad Abdus-Samad* v. *Qurban Husain* (18) where they said: "It is not, however, in accordance with sound principles of interpreting Statutes to give them a retrospective effect." The only legitimate inference is that, if an Act is not clearly retrospective, if there is any doubt upon the point, the intention of the Legislature must be taken to have been that it should not be retrospective.

As to what is a declaratory Act, the only definition that I have been able to find is in the most recent authority on the interpretation of Statute Law, Craies' Treatise on Statute Law, 3rd Edition, 1922, at page 60. In modern purposes a declaratory Act may be defined as an Act passed to remove doubt existing as to the Common Law or the meaning or effect of any Statute. Such Acts are usually held to be retrospective. Without suggesting that no Act can he retrospective unless it comes within this definition, it is at least worthy of note that in the present case if there is one thing more clear than another it is that there could have been no doubts whatever in the mind of the Legislature when it passed Act XXVII of 1926 as to what the then existing law was and that the law had been universally understood in the same sense for the previous nine years. It is unnecessary for me to deal in detail with the previous history of this matter. It is set out in full in the referring order of Mr. Justice Sulaiman and myself and mention of it is to be found in the judgment of my brother Mr. Justice Daniels. By Act XXVI of 1917 the Legislature made it apparent beyond all doubt that it accepted the view of the law laid down by their Lordships of the Privy Council and from that date onwards that was the unquestioned law.

It is, however, necessary in this connection to note a suggestion which was made during the argument but which was then not further pressed. It was hinted that it is not open to us to consider the previous history of the matter. It may be conceded at once that is is not open to us to take into consideration the Statements of Objects and Reasons, the report of the Select Committee or the proceedings in Council pre-

(17) (1861) 30 L. J. C. P. 314 at p. 318.

(18) 26 A. 119 at p. 129; 8 C. W. N. 201; 6 Bom. L. R. 238; 31 I. A. 30; 8 Sar. P. C. J. 593 (P. C.).

fatory to an Act becoming law; but there is a great distinction between such proceedings and the previous state of the law itself and the prior Acts of the Legislature. It is the universal practice when interpreting a new Act, any clause of which gives rise to any difficulty, to consider the Act whose place it takes, and I am not aware that the correctness of this practice has ever been challenged. As long ago as 1882 in *Gopal Pandey* v. *Parsotam Das* (19) Mr. Justice Mahmood, after excluding from consideration the Statements of Objects and Reasons, etc., said "We are no doubt at liberty to consider *the general state of the law* which prevailed in *pari materia* prior to the enactment of any Statute under consideration."

In *Pardo* v. *Bingham* (20) Lord Hatherly said: "The question is whether on general principles the Statute ought, in this particular section, to be held to operate retrospectively, the general rule of law undoubtedly being, that except there be a clear indication either from the subject-matter or from the wording of a Statute, the Statute is not to receive a retrospective construction..... .....In fact, we must look to the general scope and purview of the Statute, and the remedy sought to be applied, and consider what was *the former state of the law*, and what it was that the Legislature contemplated."

Further, in the absence of anything decisive, it is undesirable to give a retrospective effect to an Act where to do so would be to alter the law applicable to a claim in litigation at the time when the Act was passed. See *Leeds & County Bank* v. *Walker* (21). Maxwell in the 6th Edition of his Interpretation of Statutes at page 394 remarks: "In general, when the law is altered pending an action, the rights of parties are decided according to the law as it existed when the action was begun unless the new Statute shows a clear intention to very such rights".

That an Act is not to be interpreted, in the absence of an unambiguous direction otherwise, so as to affect vested rights, has been dealt with in the referring order of Mr. Justice Sulaiman and myself and in the judgment of Mr. Justice Daniels. Authority for the proposition is to be found *passim* in all the treatises on the interpretation of Statutes and it was further enunciated by their Lordships of the Privy Council in *Muhammad Abdus Samad* v. *Qurban Husain* (18).

Again, it is a general proposition that an Act is not to be considered retrospectively so as to affect a transaction already completed. In *Gardner* v. *Lucas* (10) Lord Blackburn said: "Where the effect would be to alter a transaction already entered into, *where it would be to make that valid which was previously invalid*, to make an instrument which had no effect at all, and from which the party was at liberty to depart as long as he pleased, binding.....I think the *prima facie* construction of the Act is that it is not to be retrospective, and it would require strong reasons to show that it is not the case."

How determined the Courts have always been to refuse retrospective effect unless it was beyond a shadow of doubt on a consideration of the whole Act and all its circumstances that a retrospective effect was given, is clear from the form of Act VI of 1913 (The Wakf Validating Act) and the cases refusing to give to that Act a retrospective effect; *cf. Niam-ul-Haq* v. *Mohammad Subhan-ul lah* (13), where Piggott, J., said: "If the Legislature intended to give validity as transfers of property *to an unascertained number of past transactions which had no such effect at the time when they were executed*, I should have expected it to do so in very clear terms." Here also we are asked to hold that the Legislature intended to give validity as transfers of property to an unascertained number of past transactions which had no such effect at the time when they were executed. Has the Legislature in this case exhibited any such intention, in very clear terms? The terms of the Waqf Validating Act were infinitely more clear. The Legislature had deliberately chosen as full a declaratory form as could well be devised, but reading the Act as a whole this Court refused to give effect to that form. In the present case the Legislature, if it intended the Act to have a retrospective effect, would appear to have carefully avoided expressing that intention in unmistakable terms. It recited no doubts, it recited no difficulties, it declared nothing and it refrained from anything but the ambiguous hint that the Act might have a retrospective effect. We

(19) 5 A. 121 at p. 135; A. W. N. (1882) 128; 2 Ind. Dec. (N. S.) 1110.

(20) (1869) 4 Ch. 735 at pp. 739, 740; 20 L. T. 464; 17 W R. 419.

(21) (1883) 11 Q. B. D. 84 at p. 91; 52 L. J. Q. B. 590; 47 J. P. 502

have considered some of the general propositions restricting interpretations in favour of a retrospective effect. The converse proposition is thus stated by Craies: "An Act is retrospective (1) when it is expressly enacted that an enactment shall be retrospective, *i. e.*, where such words occur as 'shall operate retrospectively', (2) where it is a *necessary* implication from the language employed that the Legislature intended a retrospective operation." Emphasis was laid on the strength of the implication required by the Judicial Committee in the case of *Colonial Sugar Refining Co* v. *Irving* (22), where, in interpreting the Judiciary Act, the Committee said that it "is not retrospective by express enactment or by *necessary intendment*".

In giving weight to the above propositions I would make it clear that I appreciate that no one of them is conclusive by itself, for instance, it is clear that every Act taking effect retrospectively can be said in one sense or another to affect rights of some sort; and similarly with the other propositions in particular cases they may be open to exception. But where I find each and all of the general propositions when applied to this case as well as all the considerations more particularly concerning this Act with the single exception of the words "to explain" in the preamble all pointing in one direction, I find myself impelled to hold that I cannot give to this Act a retrospective effect.

To turn to other considerations which more particularly concern this individual Act. Did it or did it not "alter the law?" I did not hear it argued at the Bar, nor so far as I am informed do either of my brother Judges consider that the law was not "altered". That the law has been "altered", that it has in fact been very radically altered appears to me a proposition beyond challenge. The law as laid down by their Lordships of the Privy Council and which remained undisturbed for nine years was clear and unmistakable. The law as laid down by the Act under consideration is equally unmistakably different and different in a very important and far-reaching particular. If it cannot be denied, and in fact is not denied, that the law has been "altered", how can it be contended that the present Act only "declares what the law has always been." The two propositions are a contradiction in terms. I have referred to the far-reaching effect of this alteration. To give the Act a retrospective effect would mean to alter the law as regards all transactions which have taken place throughout India since 1882 with the exception of those that may be barred by limitation.

In conclusion I would say that a prolonged study of all the authorities to which I have been able to obtain access has failed to furnish me with even one single parallel case where an Act altering the law which has been in unquestioned force for nine years past has been given a retrospective effect.

I do not lose sight of the fact that the words "to explain" in the preamble indicate possibly some obscure intention in the mind of the draftsman, but for the reasons I have given I find myself in no doubt as to the conclusion at which I should arrive, that is, that where the Legislature, if it so desired, could have and ought to have expressed its intention beyond doubt, I have no right to interpret this Act, ignoring the ordinary presumption, so as to give it a retrospective effect.

By the Court.—In accordance with the opinions of the majority of Judges composing the Full Bench the answer to the first question referred is that Act XXVII of 1926, is not retrospective in its nature so as to apply to documents executed prior to its coming into force. In view of this answer the second question referred does not arise.

JUDGMENT.

Sulaiman and Boys, JJ.—In view of the opinion of the majority of the Full Bench that the new Act XXVII of 1926 is not retrospective, it is clear that the deed relied upon by the plaintiff was not a valid mortgage-deed inasmuch as it had not been duly attested as required by the ruling in *Shamu Pattar* v. *Abdul Kadir Rowthan* (1). The appeal is accordingly dismissed. As, however, the findings of the lower Appellate Court were not satisfactory and the question ultimately raised in appeal was an intricate question of law, we direct the parties to bear their own costs of this appeal.

Z. K. *Appeal dismissed.*

(22) (1905) A. C. 369; 74 L. J. P. C. 77; 92 L. T. 738; 21 T. L. R. 513.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES
Nos. 631 TO 637 OF 1923.
July 21, 1925.

Present:—Justice Sir Babington Newbould, KT., and Mr. Justice Graham.

JOGESH CHANDRA BANERJEE AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
HAYDER ALI AND OTHERS—DEFENDANTS—RESPONDENTS.

Co-sharers—Purchaser of residuary share in revenue sale—Resistance by co-sharers in exclusive possession of different plots—Separate suit against each co-sharer, maintainability of—Cause of action, nature of—Parties—Arrangement before sale, how far binding on purchaser.

The residuary share of an estate was sold at a revenue sale and purchased by the plaintiffs' predecessor. The plaintiffs, being unable to get possession of any portion of the estate owing to the resistance of the co-sharers who were in exclusive possession of the different plots of the land, brought separate suits against each of the co-sharers for declaration of title and joint possession:

Held, (1) that the plaintiffs were not affected by the arrangement for separate possessnion which the other co-sharers of the estate had made between themselves before the revenue sale of the residuary share; [p. 178, col. 1.]

(2) that the plaintiffs' cause of action in each suit was based on the fact that when they tried to take possession they were resisted by the defendants in that suit; [*ibid.*]

(3) that the plaintiffs had a good cause of action against each separate set of defendants in each suit and that the cause of action was not a joint one against all the defendants; [*ibid.*]

(4) that though the other co-sharers might have been made *pro forma* defendants to each suit, their non-joinder was not fatal; and, [*ibid.*]

(5) that the suits as framed were maintainable. [*ibid.*]

Appeals against the decrees of the District Judge, Noakhali, dated the 18th September, 1922, reversing those of the Munsif, First Court, Sundwip, dated the 30th June and 9th October, 1920.

Dr. *Sarat Chandra Basak* and Babu *Jitendra Kumar Sen Gupta*, for the Appellants.

Dr. *Bijan Kumar Mukerjee* and Babu *Raj Kumar Chakravarty*, for the Respondents.

JUDGMENT.—In 1914 the residuary share of an estate was sold at a revenue sale and the plaintiffs purchased the rights of the auction-purchaser. They were unable to get possession of any portion of the estate as purchaser of this share. They then brought 8 suits for declaration of their title and for joint possession against co-sharers who were in exclusive possession of different portions of the land of the estate. At the trial the main issue between the parties was whether the separate shares entered in the Collectorate Register were recorded as separate accounts under s. 10 or under s. 11 of Act XI of 1859. The plaintiffs' contention was that separate accounts were opened under s. 10 which relates to separation of shares held in common. The contention of the defendants in each suit was that the separate accounts were opened under s. 11 which relates to the separation of shares consisting of specific portions of land. On this issue the plaintiffs succeeded and obtained decrees in the first Court. On appeal the lower Appellate Court though upholding the decision of the Munsif on the main issue decreed the appeals and dismissed the suits on the ground that they were not maintainable. I should mention that they only appealed in seven of the suits, as one had been compromised in the first Court.

In our opinion the lower Appellate Court has misunderstood the nature of the cause of action on which the plaintiffs based these suits. This is to some extent due to the unsatisfactory way in which the plaints have been prepared. The plaintiffs' real cause of action is set out in para. 5 of the plaint. But in para. 9 where they give the date of the cause of action they gave the dates of three different events which are independent of the cause of action set out in para. 5. The plaintiffs' real cause of action was that when they attempted to take possession by virtue of their purchase of each particular piece of land which was the subject of a separate suit they were in each case resisted by the defendants to the suits. These defendants in each suit are the persons who have been recorded as possessing the land in the Record of Rights prepared at the last Survey Settlement. In discussing the cause of action the first error to which the lower Appellate Court has fallen is to confuse the defaulting proprietor with the plaintiffs' predecessor. It is obvious that when he refers to the plaintiffs' predecessors he means the defaulting proprietors who owned the residuary share of the estate before the revenue sale. But they were not the plaintiffs' predecessors. The predecessor of the plaintiffs was the actual auction-purchaser and he admittedly never had any possession delivered by the Collector after his purchase at the revenue sale. The lower Appellate Court seems to think that the plaintiffs' cause of action arose at sometime

unknown when the co-sharers of the estate by mutual arrangement divided the land among themselves so that each held certain specific land as representing his respective share. But this could not be the plaintiffs' cause of action as they, having the rights of the purchaser at the revenue sale, were unaffected by any arrangement which the other co-sharers had made before the revenue sale. The effect of this mutual arrangement between the co-sharers was that they were individually possessing separate plots of land and individually asserting independent title to the land. At the trial they did not traverse the plaintiffs' allegation as to their cause of action arising from their individually refusing to allow them to take possession of the separate parcels of land which is the subject of a separate suit. It was in fact traversed in one written statement only, that in Suit No. 745 but even there the contention was not pressed at the trial and no issue was framed on this point. On the facts as alleged in the plaint and not disputed the plaintiffs have good cause of action against each separate set of defendants in each suit. Their cause of action was based on the fact that when they tried to take possession of the land which was the subject of one suit they were resisted by the defendants in that suit. Their cause of action was not as the lower Appellate Court seems to hold based on any concerted action of the other proprietors which took place before the auction-purchase. In fact there was no evidence given at the trial on either side to show that there had been any combination by the plaintiffs' co-sharers to prevent their taking possession. On the pleadings there was separate cause of action and there has been no splitting up of joint cause of action. We think it would have been better if in each of these suits the other co-sharers had been joined as *proforma* defendants and the matter decided in their presence. But that was a defect of non-joinder to which no objection was taken at the trial and it is not fatal to the plaintiffs' suits. It is merely in the present case a formal objection since it has not been shown that any of the co-sharers have been in any way prejudiced by their non-joinder in any of these suits. We hold, therefore, that the ground on which the suits have been dismissed was not established and that the suits as framed were maintainable. We think that the defects in the plaints were to some extent responsible for the mistake which has been made by the learned District Judge and we take that into consideration in respect of the order which we make as regards costs.

We decree these appeals and we set aside the judgment and decrees of the lower Appellate Court dismissing these suits. The judgment and decrees of the Munsif are restored *in toto* in respect of each of these suits. The parties will bear their own costs in this and in the lower Appellate Court.

A. N. A. *Appeals allowed.*

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 2 OF 1921.

November 1, 1922.

Present:—Mr. Kennedy, J. C., and Mr. Madgavkar, A.J. C.

GHULAM RASUL—APPELLANT

versus

PAMANDAS DEWANDAS—RESPONDENT.

C. P. C. (Act V of 1908), O. XXXIV, rr. 4, 5, Sch. II, para. 17—Mortgage—Arbitration, reference to—Award—Decree, final, whether necessary—Waiver.

There is nothing to prevent the parties to a litigation from waiving the advantage of a particular law or rule, if that law or rule is not based on a ground of public policy and is intended solely for the benefit or protection of an individual in his private capacity. [p. 179, col. 2; p. 180, col. 1.]

It is only in suits relating to mortgages, that is, suits upon a mortgage direct without an award or other agreement superseded, that rr. 4 and 5 of O. XXXIV confer certain rights upon the mortgagor, particularly the right to obtain from the Court a period of six months after the mortgage amount has been ascertained by the Court, to pay it into Court before his right of redemption is lost and the mortgage property can be put up to sale. Until the expiry of these six months the decree obtained by the mortgagee is a preliminary decree incapable of execution and it is, therefore, necessary for the mortgagee to obtain a final decree at the end of the six months to enable himself to execute the decree. Where, however, the matter is referred to arbitration out of Court and the arbitrator makes an award upon which a decree follows, the decree is capable of execution as it stands and it is not necessary in such a case to obtain a final decree. [p. 179, cols. 1 & 2.]

Appeal from the decree of the District Judge, Larkana.

Mr. *Harchandrai Vishindas*, for the Appellant.

Mr. *Tahilram Maniram*, for the Respondent.

JUDGMENT.—The question in this appeal is whether the decree-holder can succeed in his application for execution without making the decree final.

The decree was passed upon a private award without the intervention of the Court and filed in Court upon application under r. 17, Sch. II of the C. P. C. Out of the decretal amount of Rs. 860 awarded, the decree-holder was asked to give credit for Rs. 160 which was apparently interest by enjoying the produce of the land, the balance Rs. 700 was payable in four yearly instalments of Rs. 100 each commencing from January 1914 for four years the last instalment payable being Rs. 300. In default of any instalment it was to be paid along with the second but on default of two consecutive instalments the whole amount was payable at once.

It is argued for the appellant judgment-debtor that this was a mortgage-decree and therefore, O. XXXIV, r. 5, applied and made it incumbent upon the decree-holder to apply and make the decree final before he could apply to execute it. It is admitted that no instalment was paid. In support of this proposition, reliance is placed on cases such as *Narsingrao Konher Inamdar* v. *Bandu Krishna Kulkarni* (1), *Tara Prosad Roy* v. *Bhobodeb Roy* (2) *Bhagawan Ramji Marwadi* v. *Ganu* (3), *Ajudia Pershad* v. *Baldeo Singh*, (4). For the respondents, it is urged that the decree was not a decree passed by the Court in a suit relating to a mortgage nor in the terms of O. XXXIV, r. 4, nor in the form No. 4 appertaining thereto in the Sch. D and, therefore, O. XXXIV, r. 5, had no application. The decree was passed not in a suit but upon an award and by agreement between the parties. Therefore, no application to make the decree final was necessary.

We are of the opinion that the arguments for the respondent must prevail. Under the provisions of the Second Schedule, para. 17, the Court had no power to take accounts or to modify the award sought to be filed. The C. P. C. is not exhaustive. Its provisions including the provisions of O. XXXIV apply to suits relating to mortgages and lay down the procedure therein. It is only in suits relating to mortgages, that is, suits upon a mortgage direct without award or other agreement superseded, that rr. 4 and 5 conferred certain right upon the mortgagor, particularly the right to obtain from the Court a period of six months after the mortgage amount has been ascertained by the Court, to pay it into Court before his right of redemption was lost and the mortgage property put up to sale. It does not, however, follow that like any other legal rights, this right cannot be waived by agreement between the parties concerned. And it is because of this period of grace given to the mortgagor that an applicaton for a decree final becomes necessary. Until the expiry of these six months it is a preliminary decree incapable of execution and the application for a final decree at the end of six months gives the mortgagor an opportunity of postponing the sale of the property. All these considerations, however, do not hold when by agreement between the parties no such period exists; and in such cases, therefore, where by such an agreement the amount is at once recoverable by sale, the decree as it stands, is executable, there is no room for a further final decree and the necessity for such an application disappears.

The authorities relied upon for the appellant are almost entirely confined to the decision of two points. First, question of limitation and second, the difference between an application to make the decree final and an application to execute the decree, in decrees passed under O. XXXIV. The insertion of old paras. 88 and 89 in the Transfer of Property Act with certain alterations in the new C. P. C. was necessitated by difference of opinion between the High Courts upon the latter point as explained by Sir Lawrence Jenkins in *Amolak Chand* v. *Sharat Chandra* (5). Neither question, however, is the question directly at issue, and *obiter dicta* on the point now in question [see, for instance, the case of *Bhagwan Ramji Marwadi* v. *Ganu* (3)] cannot be treated as a binding authority.

On the other hand, if an application for final decree were insisted upon in a decree such as the present as has been pointed out by the learned District Judge, it would be difficult to fix the precise period at which such application should be made. It has been held that there is nothing to prevent the parties to a litigation from waiving an

(1) 46 Ind. Cas. 107; 42 B. 309; 20 Bom. L. R. 481.
(2) 22 C. 931; 11 Ind. Dec. (N. S.) 617.
(3) 23 B. 644; 1 Bom. L. R. 136; 12 Ind. Dec. (N. S.) 430.
(4) 21 C. 818; 10 Ind. Dec. (N. S.) 1176.
(5) 11 Ind. Cas. 943; 38 C. 913; 16 C. W. N. 49.

advantage of a particular law or rule, if that law or rule is not based on a ground of public policy and is intended solely for the benefit and protection of an individual in his private capacity. And consent decree directing payment by instalments, is perfectly valid in law, though it is not covered by s. 88 and though the provisions of s. 89 of the Transfer of Property Act are consequently inapplicable to it: *Vide Bechu Singh* v. *Bichharam Sahu* (6). In the present case, the Court was bound to pass the decree in terms of the award. This Court has held that an application to file an award is not a suit: *Seumal Nihal Chand* v. *Mulamal Rabumal* (7). The decree is not a decree under O. XXXIV, r. 4, and, therefore, r. 5 has no application. *Arunbati Kumari* v. *Ram Niranjan Marwari* (8), *Mangar Sahu* v. *Bhatoo Singh* (9), *Sital Singh* v. *Baijnath Prasad* (10).

We are, therefore, of opinion that the decree of the lower Appellate Court is right and the respondents are entitled to execute the decree without application to make it final.

The appeal fails and must be dismissed with costs.

Z. K. *Appeal dismissed.*

(6) 1 Ind. Cas. 677; 10 C. L. J. 91.
(7) 28 Ind. Cas. 60; 8 S. L. R. 260.
(8) 58 Ind. Cas. 299; 2 P. L. T. 38.
(9) 57 Ind. Cas. 473; 1 P. L. T. 416; 5 P. L. J. 672.
(10) 75 Ind. Cas. 485; 20 A. L. J. 602; A. I. R. 1922 All. 383; 44 A. 668.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2718 OF 1923.

April 1, 1926.

Present:—Mr. Justice Suhrawardy and Mr. Justice Page.

MOHAN SINGH CHOWDHURI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

PANCHANAN SADHUKHAN—DEFENDANT—RESPONDENT.

C. P. C. (Act V of 1908), s. 47—Execution of decree—Question relating to execution, decision of—Subsequent suit, whether maintainable.

The Legislature by enacting s. 47 and O. XXI of the C. P. C. intended and provided that all questions arising between the parties to the suit or their representatives-in-interest relating to the execution, discharge or satisfaction of the decree should be determined in the proceedings in which the decree was passed. If a party to the suit or his representative desires to raise an issue which falls within s. 47, such as whether an auction sale ought to be set aside on the ground of irregularity or fraud as provided in O. XXI, r. 90 of the Code, or whether the property sold was liable to attachment in execution of the decree, he must do so in the course of the execution proceedings as provided in the Code and not otherwise. [p. 182, col. 1.]

A stranger-auction-purchaser after the sale has become absolute and a sale certificate has been granted ought not to be left in doubt as to whether the parties or their representatives intend in the future to attack the sale in further or other proceedings. If a party to the suit or his representatives-in-interest refrain from raising a question which falls within the ambit of s. 47 and elect to stand by and do nothing while property alleged to belong to the judgment-debtor is attached and sold in execution of the decree, such persons are not to be permitted thereafter to canvass such questions in other proceedings, or to harass the auction-purchaser by launching a separate suit against him in which the sale is attacked upon some ground which could and ought to have been raised in the execution proceedings and which falls within s. 47 of the Code. In like manner the parties or their representatives are also precluded from raising such issues by way of defence in any proceedings other than those for which provision is made in the Code. [p. 182, cols. 1 & 2.]

A portion of the property of a deceased Hindu was divided among his heirs and a certain share in the property was allotted to his mother. A creditor of the mother obtained a personal decree for money against her. The mother thereafter died and in execution of the decree the decree-holder brought the other heirs of the deceased on the record as the legal representatives of the lady and sold up the share which had been allotted to her out of the property of her son. An application was made under O. XXI, r. 90 of the C. P. C. on behalf of the other heirs to set aside the sale but the application was rejected and an appeal from the order was dismissed. The other heirs then instituted a suit for a declaration that the auction-purchaser had not obtained any interest in the property at the execution sale inasmuch as the judgment-debtor possessed only a life-interest in the property and at the time of the sale that interest had come to an end:

Held, that the suit was barred by the provisions of s. 47 of the C. P. C. [p. 181 col. 2.]

Appeal against a decree of the Additional District Judge, Hoogly at Howrah, dated the 16th May, 1923, modifying that of the Munsif, Howrah, dated the 30th April, 1921.

Babu *Baranashi Basi Mukerjee*, for the Appellants.

Babus *Braja Lal Chakravarti*, *Apurba Charan Mukerjee* and *Durga Charan Roy Chowdhury*, for the Respondent.

JUDGMENT.

Page, J.—This appeal raises an interesting question of practice. The plaintiffs-appellants are members of a Hindu family governed by the Mitakshara Law. Ram Singh Chowdhuri died sometime before 1888, leaving him surviving a widow Rup

Kumari and an only son Mohan Singh Chowdhuri, since deceased. The male plaintiffs are the adult sons of Mohan Singh, and the two minor sons are represented by the plaintiff Rani Kumari their mother and natural guardian. In 1883 as the result of a partition suit a certain tank which is the subject-matter of these proceedings remained the joint property of the members of the family, but was divided into specified shares of which the plaintiffs received a 4/5th share and Rup Kumari 1/5th share. In 1898 Sib Gopal Banerji obtained a personal decree for money lent against Rup Kumari. In 1901 Rup Kumari died. In 1906 proceedings in execution of this decree were taken by Sib Gopal, the decree-holder, and in the course of these proceedings the plaintiffs were brought on the record as the legal representatives of Rup Kumari. On the 14th February, 1906, Rup Kumari's 1/5th share of the tank was sold in execution of the decree, and was purchased by Gopal Das Khetry, who is a defendant-respondent in the present appeal. The other defendants-respondents are the heirs and legal representatives of Rasik Lal Sadhukhan who was the tenant of the tank. On the 10th July, 1906, Rani Kumari applied under O. XXI, r. 90, for an order setting aside the sale on the ground of irregularity in publishing the sale proclamation, but the application was rejected, and an appeal from the order was dismissed.

On the 14th May, 1919, the present suit was instituted, and the plaintiffs prayed for a declaration that Gokul Das Khetry did not obtain any interest in the tank by purchasing Rup Kumari's 1/5th share therein at the execution sale inasmuch as Rup Kumari possessed only a life-interest in the tank, and that at the time of the sale that interest had come to an end. As against the other defendants the plaintiffs claimed arrears of rent. The trial Court dismissed the suit in its entirety, but the lower Appellate Court allowed the plaintiffs' claim to the extent of 4/5th of the rent in arrear, and in other respects dismissed the appeal. As regards the plaintiffs' prayer for a declaration that no estate or interest in the said tank passed to defendant Gokul Das Khetry on the sale it was urged on behalf of the defendants-respondents that this cause of action is *res judicata*, and is also barred by reason of s. 47 of the C P. C. In my opinion the claim is not barred by *res judicata* as it was not necessary or material for the determination of the previous suit that the Court should have decided the question in issue in the present suit. I am clearly of opinion, however, that the plaintiffs' cause of action except in respect of the claim for rent in arrear is barred by reason of s. 47 of the Code. Under s. 47 (1) it is provided that all questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree shall be determined by the Court executing the decree and not by a separate suit.

Now, it is not open to doubt or controversy that the plaintiffs who were brought upon the record after the decree was passed as the heirs and legal representatives of Rup Kumari were the representatives of Rup Kumari within s. 47, or that the question whether any interest in the tank passed on the sale was a question relating to the execution, discharge or satisfaction of the decree. *Kailash Chandra Tarafdar* v. *Gopal Chandra Poddar* (1). It is equally clear that the plaintiffs had an opportunity of raising this question in the execution proceedings, but refrained from so doing. In these circumstances I am of opinion that the plaintiffs' suit except as to the claim for arrears of rent is barred by reason of s. 47 of the Code. I respectfully agree with the Full Bench of the Allahabad High Court in thinking that:—

"If they are questions of this nature, and which properly arise between the parties or their representatives, they must be determined by order of the Court executing the decree, and not by separate suit; and the provision disallowing a separate suit to determine these questions applies not only to prohibit a suit between parties and their representatives, but also a suit by a party or his representative against an auction-purchaser in execution of the decree, the object of which is to determine a question which properly arises between parties or their representatives and relates to the execution, discharge, or satisfaction of the decree. If the question be of this nature, it is one which by s. 244 (now s. 47) must be determined by order of the Court executing the decree, and not by separate suit; and it is immaterial whe-

(1) 95 Ind. Cas. 494; 53 C. 781; 43 C. L. J. 345; 30 C. W. N. 649; A. I. R. 1926 Cal. 798.

ther the party did or did not raise it prior to the auction sale at the time of execution. If he did not, he lost the remedy which the Legislature has provided."

Basti Ram v. *Fattu* (2); see also *Punchanun Bundopadhya* v. *Rabia Bibi* (3), *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (4), *Dwarkanath Pal* v. *Tarini Sankar Ray* (5), *Ganapathy Mudaliar* v. *Krishnamachariar* (6), *Khitish Chandra Banerjee* v. *Thakamoni Debi* (7), *Seth Chand Mal* v. *Durga Dei* (8), *Gokulsing Bhikaram* v. *Kisansing Guru* (9) and *Nadamuni Narayana Iyengar* v. *Veerabhadra Pillai* (10). The appellants contend, however, that as their claim in the present suit is brought against a stranger-auction-purchaser, who is neither a party to the suit nor the representative of a party, s. 47 can have no application to the present proceedings. The answer to that contention is that the Legislature by enacting s. 47 and O. XXI of the Code intended and provided that all questions arising between the parties to the suit or their representatives-in-interest relating to the execution, discharge or satisfaction of the decree should be determined in the proceedings in which the decree was passed. If a party to the suit or his representatives desire to raise an issue which falls within s. 47, such as whether the sale ought to be set aside on the ground of irregularity or fraud as provided in O. XXI. r. 90, or whether the property sold was liable to attachment in execution of the decree, they must do so in the course of the execution proceedings as provided in the Code and not otherwise. A stranger-auction-purchaser after the sale has become absolute and a sale certificate has been granted ought not to be left in doubt as to whether the parties or their representatives intend in the future to attack the sale in further or other proceedings. If a party to the suit or his representatives-in-interest refrain from raising a question which falls within the ambit of s. 47 and elect to stand by and do nothing while property alleged to belong to the judgment-debtor is attached and sold in execution of the decree, such persons are not to be permitted thereafter to canvass such questions in other proceedings, or to harass the auction-purchaser by launching a separate suit against him in which the sale is attacked upon some ground which could and ought to have been raised in the execution proceedings and which falls within s. 47 of the Code. In like manner the parties or their representatives are also precluded from raising such issues by way of defence in any proceedings other than those for which provision is made in the Code: see *Gokulsing Bhikaram* v *Kisansing Guru* (9), *Maganlal* v. *Doshi Mulji* (11) and *Amir Rai* v. *Basdeo Singh* (12) upon which the learned Pleader for the appellants relied do not support the appellants' contention, for in each of those cases the judgment-debtors applied to the Court to set aside the sale under s. 310A of the Code of 1882 (now O. XXI, r. 89), and thus the question to be determined upon the application arose solely between the judgment-debtor and the auction-purchaser, for it matters not to the decree-holder whether he receives payment of the sum due to him under the decree from the judgment-debtor or from the auction-purchaser. For these reasons, in my opinion, the plaintiffs' claim to the declaration for which they pray is barred by s 47. Further, the Court is not entitled now to treat the present suit as an application under s. 47, for such an application would be barred by limitation: *Lalman Das* v. *Jagan Nath Singh* (13) and *Satish Chandra* v. *Nishi Chandra* (14).

As regards the claim for arrears of rent, the plaintiffs-appellants contend that they are entitled to interest upon the sum awarded to them and the costs of that issue, but, in my opinion, in the circumstances the order of the learned District Judge refusing the plaintiffs such relief ought not to be disturbed. The result is that the appeal fails, and must be dismissed with costs.

(2) 8 A. 146; A. W. N. (1886) 37; 4 Ind. Dec. (N. S.) 1117 (F. B.).
(3) 17 C. 711; 8 Ind. Dec. (N S.) 1016.
(4) 19 I. A. 166; 19 C. 683; 6 Sar. P. C. J. 209; 9 Ind. Dec. (N. S.) 898 (P. C.).
(5) 34 C. 199; 5 C. L. J. 294; 11 C. W. N. 513.
(6) 44 Ind. Cas. 855; 45 I. A. 54 at p. 60; 23 M. L. T. 198; 27 C. L. J. 367; 31 M L. J. 463; 4 P. L. W. 310; (1918) M. W. N. 310; 22 C. W. N. 553; 16 A. L. J. 353; 41 M. 403; 20 Bom. L. R. 580; 8 L. W. 427 (P. C.).
(7) 46 Ind. Cas. 458; 27 C. L. J. 572.
(8) 12 A. 313; A. W. N. (1890) 137; 6 Ind. Dec. (N. S.) 946 (F. B.).
(9) 7 Ind. Cas. 457; 37 B. 546; 12 Bom. L R. 539.
(10) 8 Ind. Cas. 429; 34 M. 417; (1910) M. W. N. 662; M. L. T. 152; 21 M. L. J. 928.
(11) 25 B. 631; 3 Bom. L. R. 255.
(12) 5 C. L. J. 204.
(13) 22 A. 376; A. W. N. (1900) 129; 9 Ind. Dec. (N. S.) 1285.
(14) 54 Ind. Cas. 431; 46 C. [975.]

Suhrawardy, J.—I agree. I wish to express my surprise at the strenuousness with which it was argued that the words "all questions arising between the parties to the suit" in s. 47 of the Code must mean all questions, which were actually raised in the execution proceedings. I do not think that those words should be interpreted in that way. What I understand by those words is that the questions must be such as would relate to or affect the rights of parties to the suit. Otherwise, if we accept the contention of the appellant, the result will be that by not raising a particular question in the execution proceedings a party will thereby retain the right to bring a separate suit in order to agitate that question. As has been pointed out by the Privy Council in several cases, proceedings under s. 244 of the Code of 1832 (corresponding to s. 47 of the Code of 1908) were intended to dispose expeditiously of all questions arising relating to execution. On other points I agree with the judgment of my learned brother.

Z. K. *Appeal dismissed.*

OUDH CHIEF COURT.

SECOND CIVIL APPEALS NOS. 509 AND 540 OF 1925.

November 22, 1926.

Present:—Mr. Justice Hasan and Mr. Justice Raza.

CHANDIKA SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

BITHAL DAS AND ANOTHER—DEFENDANTS—RESPONDENTS.

Appeal, second—Finding of fact, erroneous, whether binding—Finding based upon inference drawn from documentary evidence, whether can be challenged—Mortgage, usufructuary—Surplus profits in hands of mortgagee—Interest, whether can be allowed.

The finding of fact based upon admissible evidence even though erroneous, must be accepted in second appeal. [p. 184, col. 1.]

Where documents which are mere pieces of evidence, are considered by the lower Appellate Court in determining questions of facts, findings based on constructions of or inferences drawn from such documentary evidence cannot be questioned in second appeal. [*ibid.*]

A deed of usufructuary mortgage provided that the surplus profits after paying off the principal and the interest due under the mortgage must be returned immediately to the mortgagor. It was found that the mortgagee instead of keeping and producing correct accounts had been guilty of producing false and suspicious accounts and had also been guilty of dishonesty:

Held, that under these circumstances the Court would be justified in awarding to the mortgagor interest upon the surplus profits which remained in the hands of the mortgagee. [p. 184, col. 2.]

Second appeal against the judgment and decree of the Second Additional Subordinate Judge, Lucknow, dated the 6th July, 1925, modifying that of the Munsif, South Lucknow, dated the 30th September, 1924.

Messrs. *Radha Krishna* and *Ali Zaheer*, for the Appellants.

Messrs. *H. Husain* and *P. L. Verma*, for the Respondents.

JUDGMENT.—These Appeals (Nos. 509 and 540 of 1925) arise out of a redemption suit. The plaintiffs' predecessors in title had mortgaged the property in suit (a certain share in a Bhaiya Chara village called Raitha in the District of Lucknow) to the defendants' predecessors-in-title, by two deeds, one dated the 19th January, 1897, and the other dated the 20th January, 1899. The defendants are in possession of the property under the said deeds. The profits of the mortgaged property were to be applied in payment of the principal and interest and the surplus, if any, was to be returned to the mortgagors.

The plaintiffs' case was that the mortgages in suit were satisfied from the usufruct long ago and so they were entitled to redeem the property without payment of any sum. They further wanted that the defendants should be required to render accounts of the profits and prayed for a decree for the surplus which might be found due to them from the defendants

The defendants admitted the title of the plaintiffs Nos. 1 and 2 to redeem the property in suit, but alleged that a large amount was still due to them from the plaintiffs in respect of the two mortgages mentioned above.

The principal dispute between the parties was one of accounting.

The learned Munsif passed the preliminary decree for redemption giving the necessary directions for accounting.

The defendants appealed and the result was that the decree of the first Court was slightly modified.

The parties have now come to this Court in second appeal Appeal No. 509 of 1925 is the plaintiffs' appeal and Appeal No. 540 of 1925, the defendants' appeal. Our judg-

ment in this appeal will govern both the appeals.

We are relieved of the necessity of narrating at length the facts of this litigation, as the judgment under appeal summarises very clearly all the questions in debate. The learned Subordinate Judge has discussed the whole evidence at length on all the important points.

We take up the plaintiffs' appeal first. This appeal has been pressed before us upon two grounds only :—

(1) The plaintiffs are entitled to claim accounts in respect of the produce of three mangoe trees, called Belha, Tuhroo and Koeliya comprised in the mortgage.

(2) The plaintiffs are entitled to receive the profits of the entire groves called Ram Begh, Lehrwa, Harikabatwar and Pharendhi to the extent of half realised by the defendants in respect of the entire groves.

We think these pleas are not pleas of any substance and the plaintiffs' appeal is concluded by findings of facts. The trees in dispute mentioned above admittedly stand on the land which is included in a certain *patti* not comprised in the mortgage. The learned Subordinate Judge has found, on evidence, that the land on which the said trees stand is included in a *patti* which belongs to the defendants and that the trees in dispute also belong to the defendants.

These findings, being findings of facts based upon admissible evidence, must be accepted in second appeal. It must be borne in mind that there is no jurisdiction to entertain a second appeal on the ground of even an erroneous finding of fact, however gross or inexcusable the error may seem to be [see *Durga Chowdhrani* v. *Jewahir Singh Chowdhri* (1)]. It should also be borne in mind that, where documents which are mere pieces of evidence, are considered by the lower Appellate Court in determining questions of facts, findings based on constructions of or inferences drawn from such documentary evidence cannot be questioned in second appeal [see *Midnapur Zemindary Co., Ltd.* v. *Uma Charan Mandal* (2)].

As regards the groves mentioned above, the learned Subordinate Judge was perfectly right in passing the order in question. He was not satisfied with the evidence given by the plaintiffs' witnesses about the profits of the groves. He rejected the evidence and having considered the statements made by the Pleaders of the parties about apportionment of the profits of the groves, agreed with the learned Munsif in holding that the entries in the *khetaunis* should be taken to be correct. Under these circumstances there is no force in the plaintiffs' plea mentioned above. We think the plea was rightly rejected by the learned Subordinate Judge.

The plaintiffs' appeal thus fails and must be dismissed.

Now we take up the defendants' appeal. We think there is no force in this appeal also.

This appeal has been pressed before us upon one ground only. It is contended that the lower Courts should not have allowed interest on surplus profits which might be found due to the plaintiffs. Under the terms of the mortgage-deed, dated the 20th January, 1899, the surplus was to be returned immediately to the mortgagors. It has been found in this case that the mortgagees instead of keeping and producing the correct accounts have been guilty of producing false and suspicious accounts, have raised numerous wrong pleas and are guilty of dishonesty. Under these circumstances we think the lower Courts were quite justified in awarding interest on the surplus profits in the hands of dishonest mortgagees. The rate of interest (one per cent. per mensem simple) fixed by the lower Courts is not unreasonable under the circumstances of the case. We are not, therefore, prepared to accept the defendant's contention mentioned above.

The other pleas raised in the memorandum of appeal are not pleas of any substance. They were not pressed by the appellants' learned Counsel and we dismiss them at once from consideration.

The result is that the defendants' appeal also fails and must be dismissed.

We dismiss both the appeals with costs. The decree of the lower Appellate Court is confirmed in all respects.

Z. K. *Appeals dismissed.*

(1) 18 C. 23: 17 I. A. 122; 5 Sar. C. J. 560; 9 Ind. Dec. (N. S.) 16 (P. C.).

(2) 74 Ind. Cas. 482; 21 A. L. J. 723; A. I. R. 1923 P. C. 187; 4 P. L. T. 627; 33 M. L. T. 291; (1923) M. W. N. 832; 45 M. L. J. 663; 25 Bom. L. R. 1287; 40 C. L. J. 16; 39 C. W. N. 131 (P. C.).

OUDH CHIEF COURT.

SECOND CIVIL APPEAL No. 443 OF 1925.

October 22, 1926.

Present:—Mr. Justice Hasan and Mr. Justice Raza.

RAMPADARATH—DEFENDANT—APPELLANT

versus

GANGA PRASAD—PLAINTIFF AND OTHERS—DEFENDANTS—RESPONDENTS.

Co-sharer—Joint thekadar—*Suit for profits—Rent not actually collected—Joint* thekadar, *when liable to account for.*

In a suit by a *thekadar* for his share of the profits against a joint *thekadar*, the latter can be made liable for the profits which he has not actually collected only where the failure to collect such profits is proved to have been due to the defendant s negligence or misconduct.

Muhammad Inayat Husain v. *Muhammad Karamat Ullah* (1), relied on.

Second civil appeal against a decree of the First Subordinate Judge, Bahraich, dated the 29th May, 1925, modifying that of the Munsif, Bahraich, dated the 20th February, 1925.

Messrs. *R. B. Lal* and *Raj Narain Shukla*, for the Appellant.

Mr. *Ram Prasad Verma*, for the Respondent.

JUDGMENT.—This is an appeal by the defendant No. 2 from a decree of the First Subordinate Judge of Bahraich, dated the 29th of May, 1925, in a suit for rendition of accounts, modifying a decree of the Munsif of Bahraich, dated the 16th of February, 1925.

The facts of the case so far as it is necessary to state them for the purpose of disposing of this appeal are as follows:—

The parties are joint *thekadars* of villages Rajapur and Bakhsuhiya in the District of Bahraich. The plaintiff's share is 2 annas. It is admitted that the defendants Nos. 1 and 2 make collections and have to keep accounts. The present suit was brought by the plaintiff for rendition of accounts for the years 1329 to 1331 *Fasli*. The defendants admitted their liability to render accounts. A preliminary decree was passed on the 28th of November, 1924. The final decree was passed on the 16th of February, 1925.

The learned Munsif gave the plaintiff a decree for Rs. 337-9-5 and costs against the defendants Nos. 1 and 2. The plaintiff appealed and the defendants filed cross-objections. The result was that the learned First Subordinate Judge modified the decree of the learned Munsif and gave the plaintiff a decree for Rs. 671-3 and costs against the defendants Nos. 1 and 2 jointly. The defendant No. 2 has now appealed to this Court.

The only point for determination in this appeal is whether the plaintiff should get profits on the gross-rental or on actual collections. The learned First Subordinate Judge has allowed profits on the gross-rental. The defendant No. 2 challenges the finding on that point.

In this case it was for the plaintiff to allege and prove negligence or misconduct on the part of the defendants if he wanted to charge them with the liability to pay the profits on the gross-rental. He has, however, failed to do so. Even in a suit by a recorded co-sharer against a *Lambardar* for his recorded share of profits of a *mahal* in which the plaintiff seeks to make the defendant liable not only for the profits which the latter has actually collected but for those which through gross negligence or misconduct he has omitted to collect the burden of proving such negligence or misconduct rests in the first instance on the plaintiff [see the principle of the decision in the case of *Muhammad Inayat Hussain* v. *Muhammad Karamat Ullah* (1)].

The result is that the decree of the lower Appellate Court is modified. The plaintiff will now get a decree for Rs. 582-12-0 instead of Rs. 671-3-0 awarded by the Court below. He will also get his costs on Rs. 582-12-0 in the Courts below. In the circumstances of the case we make no order as to costs in this Court.

A. N. A. *Decree modified.*

(1) 12 A. 301; A. W. N. (1890) 131; 6 Ind. Dec. (N. S.) 939 (F. B.).

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 317 OF 1924.

September 22, 1926.

Present:—Mr. Justice Devadoss and Mr. Justice Sundaram Chetti.

ALAMURI PUNNIAH—RESPONDENT No. 2—APPELLANT

versus

FIRM SAGARAJEE KASARMAL, TENALI AND OTHERS—PETITIONERS—RESPONDENTS.

Provincial Insolvency Act (V of 1920), s. 5—Partners, liability of, on joint debt—Separate acts of

insolvency—Single petition to adjudge all as insolvents, whether maintainable—Joint act of insolvency, whether necessary.

Where two partners are liable to a creditor under a joint debt and each of them is alleged to have committed acts of bankruptcy, during the continuance of the joint debt, by making certain alienations with a view to defraud or defeat the creditors of the firm or with the object of giving a fraudulent preference, a single petition for adjudging both of them as insolvents cannot be deemed to be unsustainable merely because they have not committed a joint act of insolvency. The test is, whether if the application were treated as a suit it would be bad for multifariousness. [p. 186, col. 2.]

Bolisetti Mamayya v. *K. R. Rice Mill Co.* (1), followed.

Appeal against an order of the District Court, Guntur, dated the 3rd April, 1924, in I. P. No. 43 of 1923.

Mr. *B. Satyanarayana*, for the Appellant.

Mr. *B. Somayya*, for the Respondents.

JUDGMENT.—This appeal arises out of a petition filed by a creditor to adjudge respondents Nos. 1 and 2 insolvents. The 2nd respondent is the son-in-law of the 1st respondent.

The main contention put forward on behalf of the appellant here (who was the 2nd respondent in the lower Court) is that a single petition for adjudicating both the respondents as insolvents is bad for misjoinder, and, therefore, unsustainable. There is no doubt that they are liable to the petitioner for a joint debt. The learned District Judge has also found upon the evidence on record that they are also partners. That finding has been challenged before us but we are satisfied that the inference drawn by the learned Judge is on the whole correct. Each link in the chain of circumstances adverted to by him may be inconclusive by itself, but the cumulative effect of all the links justifies his conclusion. We are not prepared to differ from him on this point. It is, however, contended by Mr. Satyanarayana that a single petition against both the respondents is unsustainable, unless it is shown that they are guilty of a joint act or acts of insolvency. The observations on page 186 in Williams on Bankruptcy Practice (13th Edition) are pertinent to the present case: "In order to sustain a joint petition against two or more persons, it is necessary that some acts of bankruptcy shall have been committed by each of them. This may be a joint act of bankruptcy; but it is not requisite that they should have committed a joint act of bankruptcy or that they should all have committed an act of bankruptcy of the same kind; and in order to support a joint petition against all the members of the firm, the acts of bankruptcy must have been committed during the continuance of a joint debt and the petition must be founded on a joint debt."

We are of opinion that where two partners are liable to a creditor under a joint debt and each of them is alleged to have committed acts of bankruptcy, during the continuance of the joint debt by making certain alienations with a view to defraud or defeat the creditors of the firm or with the object of giving a fraudulent preference, a single petition for adjudging both of them as insolvents, cannot be deemed to be unsustainable merely because they have not committed a joint act of insolvency. The test is, whether if the application were treated as a suit the suit would be bad for multifariousness, as was held in *Bolisetti Mamayya* v. *K. R. Rice Mill Co* (1) In that case, the members of a joint Hindu family were sought to be adjudged insolvents. It seems to us, that that decision does not go to the length of laying down that, if the acts of insolvency are not joint but separate, a single petition would not lie, though it would not be bad for multifariousness, when treated as a suit. If the act of insolvency committed by each partner would be one of the circumstances affording a cause of action against him, it has still to be shown that the two causes of action cannot be made the subject of trial on a single application as it would amount to a misjoinder. We are unable to find such inconvenience as would make it obligatory on the Court to ask the petitioner to confine his case to one of the respondents by way of election. We hold that there is no legal bar to the maintainability of a single petition against both the joint debtors who are also partners in this case.

As for the question whether the 2nd respondent is shown to have committed an act or acts of insolvency, we cannot say that the learned Judge is wrong in his inference. The alienations effected by the 2nd respondent are mortgages under Exs. C and CI, one of which was in favour of his own wife's sister's husband. There is a cloud of suspicion hanging over these transactions which would come under cls. (*b*) and (*c*) of s. 6 of the Act. We hold that the

(1) 63 Ind. Cas. 916; 44 M. 810; 29 M. L. T. 288; (1921) M. W. N. 330; 40 M. L. J. 570; 14 L. W. 428

order of the District Judge is correct, and dismiss this appeal with costs.

The respondent is entitled to his costs in the lower Court. We allow the memorandum of objections. The respondent will add the amount of his costs to the amount already due to him.

V. N. V. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 506 OF 1925.

September 30, 1926.

Present:—Mr. Hallifax, A. J. C.

BIKRAM AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Thakur GANESH SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

C. P. Tenancy Act (I of 1920), ss. 11, 35—Occupancy holding—Surrender—Hindu widow, power to surrender whether absolute - Reversioner, whether can impeach.

Under the C. P. Tenancy Act a Hindu widow has an absolute right to surrender to the landlord her occupancy holding inherited by her from her husband and a surrender by her cannot be impeached by the reversioners of her husband for want of legal necessity. [p. 188, cols. 1 & 2.]

Appeal against a decree of the Additional District Judge, Bilaspur, dated the 31st August, 1925, in Civil Appeal No. 98 of 1925.

Mr. *G. R. Deo*, for the Appellants.

Messrs. *V. Bose* and *P. N. Rudra*, for the Respondents.

JUDGMENT.—The last of the three grounds of appeal seeks to re-open a question of fact decided against the appellants in what purports to be a different form. The suit against them was based on a surrender on the 12th of August, 1922, by a Hindu widow of an occupancy holding inherited by her from her husband. The widow, Safuri Chamarin, died in 1923. The defendants pleaded that "in 1921 *Musammat* Safuri became insane and quite devoid of common sense," and that she was "quite insane" at the time she executed the deed of surrender. It has been found on the evidence that her alleged insanity has not been proved, and it is now urged in appeal that it should be held that in executing the deed of surrender Safuri did not act voluntarily or with knowledge of what she was doing, because she is proved to have been at least of weak intellect, if not actually insane.

The plea is certainly not permissible, but an examination of it shows that it must fail anyhow. Not one of the defendants went into the witness-box to support it, but they put in three caste-fellows to do so. The first Dukalu (D. W. No. 1) is recorded as saying: "*Musammat* Safuri had become mad since 2 years before her death and she used to take off her clothes and go naked sometime and, therefore, we used to avoid her owing to shame and she used to remain without food for a few days owing to derangement of her mind.....I don't know if *Musammat* Safuri got mad before or after the execution of the surrender deed." Sukhandi Chamar (D. W. No. 2) said: "*Musammat* Safuri had become insane since 2 years before her death and used to talk in an irrelevant way and so she struck me as mad...I did not see Safuri going naked in the village. She had come to Bilaspur during her insanity." The third witness Itwari Chamar (D. W. No. 3) said only: "*Musammat* Safuri had become an idiot for 2 years till her death."

It is idle to contend that though this evidence fails to prove what was alleged, that the woman was insane during the whole of the two years, it still proves that she was lacking in understanding at some times, and that the day on which she executed the deed of surrender was one of them. But further any such suggestion is completely rebutted. The registration endorsements on the deed show, as the learned Additional District Judge has pointed out, that she appeared before the Sub-Registrar and admitted execution of the document and receipt of the consideration mentioned in it without showing any signs of a failure to understand the transaction completely.

The plaintiff's first witness, Muhammad Khan who wrote the deed said it was executed in his presence and "the executant was then of sound mind and she had no mental derangement. The document was read over to her and she admitted all its terms." Sukaru Chamar (P. W. No. 2) who attested the execution of the deed said: "*Musammat* Safuri was then in good condition of mind and body and was in the best of her senses and had no mental derangement or disorder." The last witness is the plaintiffs' *mukhtiyar* and he also said: "*Musammat*

Safuri.....was of sound mind till her death." I find it proved affirmatively that Safuri executed the deed of surrender voluntarily and with full knowledge of what she was doing.

But the main ground of appeal is the contention that the surrender to the landlord by a Hindu woman of a tenancy inherited from a male, like a transfer by her of any other property so inherited, is invalid against that male's reversionary heirs unless there was legal necessity for making it. The contrary view was very clearly expressed in *Vithu* v. *Mendri* (1) and *Dajiba* v. *Raghunath* (2) which I am bound to follow unless they are distinguishable. It is sought to distinguish both cases on the ground that they deal with the old Tenancy Act of 1898, not the present Act of 1920. The difference in the law arising out of the omission from the Tenancy Act 1920 of the provisions of s. 36 of the Act of 1898 seems to make it still more impossible under the present Act to set aside the surrender. The suggestion that the later of the two cases can be distinguished by the fact that the holding in question there was an absolute occupancy holding does not apply to *Vithu* v. *Mendri* (1) and anyhow the reasons stated in the judgment in the former case in respect of an absolute occupancy holding apply with even greater force to an occupancy holding.

It is next urged that the decision of the question in both judgments is wrong and it ought to be laid before a Bench to be examined again. The reasons advanced for regarding the view that has prevailed for so long as incorrect are those set out at length in the judgment of Kinkhede, A. J. C., in *Wasudeo* v. *Bhiwa* (3) which was decided by a Bench of this Court. But the question was not one that fell to be decided in the case. The question for decision was that of the devolution of the tenancy on the death of the widow who held it, not that of her rights in respect of it, while she held it. Many reasons are given in support of the conclusion stated incidentally, that a Hindu woman cannot surrender an occupancy holding inherited from a male to the landlord except for legal necessity or with the consent of the reversioners, but, if I may say so with respect, they have not convinced me of the correctness of the proposition, particularly in face of the fact that the only surrender of that kind in the case was treated as perfectly valid all through it.

There appears, on the contrary, to be a simple but cogent reason for regarding the view that has prevailed in this Court for so many years as correct. An agricultural tenancy is exactly the same as any other tenancy, such as that of a house, except for enlargements or restrictions made by the Tenancy Act in the rights or liabilities of either party to the contract. The only difference with which we are now concerned between an agricultural tenancy and tenancy of a house is that made by s. 11 of the Tenancy Act 1920. That is the only provision I have ever heard cited as limiting a Hindu woman's power to surrender an occupancy holding inherited from a male.

But that section says nothing about her rights as a tenant; it merely says, in its effect on such a case, that the tenancy shall pass on her death to her husband's heirs and not to her own. A tenancy, like any other contract, is personal and without s. 11 the unexpired term of any tenancy held by a Hindu woman would pass on her death to her own heirs, however she acquired it. Section 11 alters that in respect of an agricultural tenancy acquired by inheritance from a male, and makes it pass to the heirs of the male instead of her own. But it alters nothing else, and she has the same rights in respect of the contract of tenancy while it exists as if she had made it herself with the landlord. The words of the section show very clearly that its scope is limited to the way in which occupancy rights are to *pass*.

Another conclusive argument in support of the absolute right of surrender in such cases is to be found in s. 35 of the Tenancy Act. If there were no such right, the tenant and landlord could attain exactly the same result if the holding were left fallow and the rent left unpaid for a year and the tenant were to go to another village at the end of the year ostensibly but not necessarily in fact without any intention of returning. She might wish to resile from her agreement later, but her application for reinstatement under s. 36 would inevitably fail because it would be clear that she did intend to abandon the holding. The same thing could be done under s. 35 (4) of the

(1) 4 Ind. Cas. 792; 5 N. L. R. 172.
(2) 20 Ind. Cas. 920; 9 N. L. R. 126.
(3) 89 Ind. Cas. 44; 21 N. L. R. 62; A. I. R. 1925 Nag. 306.

Act of 1898, by what was called "implied surrender"; that took two years, but it did not require the intervention of a Revenue Officer nor the absence of the tenant from the village. It is impossible to suppose that the Legislature intended to restrict the power to surrender directly, and yet provided this very simple way of evading that restriction.

Regarding the matter from the point of view of the landlord, the reasons for holding that such a surrender can be made are also strong. It it could not, then a contract of perpetual lease between him and a Hindu tenant who died leaving his wife or daughter or mother as his only heir could only be cancelled with the joint consent of the tenant at the time and the reversionary heirs of the last tenant. That would mean that by the death of the other party to the original contract the landlord would be deprived of no small part of his rights under it. The words of s. 11 of the Tenancy Act as they stand cannot be read as bringing about any such result, nor can they have been even intended to do so.

As Drake-Brockman, J. C., said in *Dajiba* v. *Raghunath* (2) such an interpretation of the law would also mean that "a landlord might have to deal with a reversioner's claim as much as a century after the death of the tenant from whom descent should be traced: take for instance the case of a tenant who leaves a girl-widow and an infant daughter, the women succeeding one after the other and the daughter surrendering at the very close of a long life." In speaking of a century the learned Judicial Commissioner seems to have added the two concurrent lives together; it is hardly likely that the infant daughter would live for a hundred years. But the argument is equally sound and if we substitute half a century or three quarters of a century for the period mentioned, it becomes stronger if we take the case of a female heir to a tenancy surrendering it at the *beginning* of a long life.

I am in entire and respectful agreement with the decisions in the two cases discussed. They are not in conflict, as has been explained, with the actual decision in *Wasudeo* v. *Bhiwa* (3) or with that in any of the cases there mentioned. Each of those cases deals with the passing on the death of a Hindu woman of a tenancy inherited by her from a male and still held by her up to her death, not with her rights and liabilities in respect of it during her life. The appeal will be dismissed and the appellants must pay the whole of the costs of both parties in all three Courts. The Pleader's fee in this Court will be fifty rupees.

G. R. D. *Appeal dismissed.*

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 6 OF 1926.

June 25, 1926.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, Mr. Justice Panton and Mr. Justice Graham.

BROJENDRA KISHORE ROY CHAUDHURI—DEFENDANT—APPELLANT

versus

MOHIM CHANDRA BHATTACHARJI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Evidence Act (I of 1872), ss. 13, 167—C. P. C. (Act V of 1908), s. 103 as amended by Act VI of 1926—Bengal Tenancy Act (VIII of 1885), s. 103B—Recital in deed not inter partes, *aamissibility of—Finding arrived at partly on basis of inadmissible evidence—Appeal, second—High Court, power of, to determine issue—Landlord and tenant—Assessment of rent—Rent-free tenure—Record of Rights, entry in—Presumption—Land held without payment of rent, effect of.*

A recital in a sale-deed that the vendor possesses certain rights in the property sold is not admissible in evidence in a suit between the vendor or his successors-in-interest and third persons in which a dispute arises as to whether the vendor had or had not such rights in that property. [p. 194, col. 1]

There is great difficulty in applying the provisions of s. 167 of the Evidence Act to the generality of cases which come before the High Court on second appeal, inasmuch as the High Court has no power in second appeal, to deal with the sufficiency of the evidence; it has only a right to entertain questions of law. When evidence has been wrongly admitted by the Court below the High Court has, generally speaking, no right to decide whether the remaining evidence in the case, other than that which has been improperly admitted, is sufficient to warrant the finding of the Court below. The High Court cannot decide that question without examining in detail the other evidence and determining as a question of fact, whether it is sufficient of itself to warrant the lower Court's finding. [p. 197, col. 1.]

The only cases which the High Court can with propriety dispose of under such circumstances without a remand are those where, independently of the evidence improperly admitted, the lower Court has apparently arrived at its conclusion upon other grounds. Where this is clear from the judgment, a remand is unnecessary, because then the error committed by the lower Court has not affected the decision upon the merits. [*ibid.*]

Under the provisions of s. 103 of the C. P. C., how-

ever, where the High Court finds in second appeal that an issue of fact has been determined by the lower Court upon evidence, a portion of which was not admissible, it is open to the High Court to determine that issue itself. [p. 198, col. 2.]

A remark in the Record of Rights that certain land is liable to be assessed with rent although no rent has been paid in respect of it carries with it the presumption of correctness under the provisions of s. 103B of the Bengal Tenancy Act and the mere fact that rent has not been paid in respect of the land coupled with the fact that the persons in occupation of the land have been in possession of it for an indefinite period is not enough to rebut the entry and to establish that such persons are holding the land rent-free. [p. 191, col. 2; p. 198, col. 2.]

Letters Patent appeal against the dissentient judgment of Mr. Justice Cuming in Second Appeal No. 2467 of 1923, dated the 8th February, 1926, affirming the decree of the Subordinate Judge of Mymensingh, dated the 11th August, 1923, reversing that of the Additional Munsif, Iswarganj, dated the 26th February, 1923.

JUDGMENT.

Cuming, J.—The facts of the case out of which this appeal arises are briefly these:

The plaintiff sued for the assessment of a fair rent on a certain plot of land some 2.48 acres in area and arrears of rent for the years 1325—1328 with the usual cesses. His case was that the defendants had an occupancy right only in the land. The defence was that the land was held rent-free.

The first Court decreed the plaintiff's suit. The Court of Appeal held that the defence had proved that they had been in possession of the land for a long period (some 80 years at least) without paying rent and from this fact he inferred that the original grant was a rent free one and dismissed the plaintiff's suit.

The plaintiff has appealed and he has put forward three contentions, (1) That the lower Court wrongly admitted in evidence a certain *kobala* Ex. A. The *kobala* was executed in 1281 by one Govinda, the predecessor-in-interest of the defendants by which he purported to sell the land in dispute together with some other land to his sister. In the document the vendor described his title as a *nishkar brahmattar* right.

The appellant contends that this statement is not admissible in evidence against him as he was no party to the document and also that as it was a *benami* document there was no real transaction and so for that reason only s. 13 of the Evidence Act would not make the statement admissible. The respondent relies on s. 13, Evidence Act.

Section 13 is divided into two cls. (*a*) and (*b*).

(*a*) is as follows:—Any transaction by which the right or custom in question was claimed, created, modified, recognised, asserted or denied. The respondent contends that by the sale the *nishkar* right was claimed or asserted.

Now the transaction was the sale of the property. Can it be said that the *nishkar* right was asserted or claimed by this sale?

I think not. All that could be said to be asserted by the sale was that the vendor had some saleable interest in the property, not what the nature of that saleable interest was.

The *nishkar* right of the vendor was no doubt asserted in the document by which the sale was effected but not by the transaction or sale. Clause (*a*) does not, I think, help the respondents. We must then consider cl. (*b*). Clause (*b*) is divided into two parts, first, particular instances in which the right was claimed, recognised or exercised.

The respondent would contend that this is an instance where the right was claimed.

I do not think so. It is, no doubt, an instance in which the right is asserted but to assert a right is not the same as to claim it.

This, I think, is clear from the fact that in cl. (*a*) both words are used. "Claim," I think, must mean that the right is asserted to the knowledge and in the presence of the person whose right will be derogated by the establishment of the claim. The mere assertion of the right in a document, to which the person against whom the right is asserted, is not a party and of which he knows nothing is not to claim the right. This part of cl. (*b*) does not help the respondent.

Neither does the second part of cl. (*b*) which is as follows:—"Instance in which its exercise is disputed, asserted or departed from." The mere statement in the deed of sale that the vendor had a *nishkar* right cannot be said to be an instance when the exercise of the right was asserted. It is difficult for me to conceive how a *nishkar*

transaction right can be exercised except perhaps by the refusal to pay rent.

There is a further argument that has been put forward by the appellant. The Court has found that the sale was a fictitious one. I have considerable doubts whether the execution of a *benami* document by which nothing really passes can be called a transaction. It is obviously a fictitious transaction and as such would not come within s. 13.

I am of the opinion that the *kobala*, Ex. A, is not admissible. I do not, however, think that the admission vitiates the decision of the lower Appellate Court. It is to be noted that it was admitted without objection in both the lower Courts and the objection is raised for the first time in second appeal. It has not even been specifically taken in the ground of appeal.

Had the objection been taken in either of the Courts of fact, it could then have been dealt with. It seems to me to be unfair to allow a party in second appeal for the first time to object to the reception of evidence with the possible necessity of the case being sent back for re-hearing.

Neither do I think that the Court relied on this piece of evidence in coming to its decision.

Reading the judgment as a whole I think it is quite clear that the judgment is really based on the inference which the Courts drew from the long and uninterrupted possession without paying rent.

In such a case it is not necessary to send back the case to be re-considered excluding the inadmissible evidence. See the case of *Womes Chunder Chatterjee* v. *Chundee Churn Roy Chowdhry* (1). I do not think, therefore, that the admission of this evidence is a ground for interfering with the decision of the lower Court. The next contention put forward is that the Settlement Record shows that the land is liable to pay rent and that in accordance with s. 103B, Bengal Tenancy Act, there is a presumption of the correctness of the entry. The lower Appellate Court has not considered the record or definitely found that it had been rebutted. There is little substance in this contention. The learned Judge had obviously the Settlement Record before him, for he twice refers to it. No doubt he does not state in so many words that the entry in the Settlement Record has been rebutted but it is perfectly clear from a perusal of the whole judgment that this is what he has found. The effect of the presumption in the Settlement Record is to throw on the defendant the burden of proving that his land is not rent-paying. The learned Judge has obviously dealt with the case from this point of view.

He dealt at some length with the question whether the defendant has or has not ever paid rent. He finds that he has not done so for some 80 years at least and from that fact draws the inference that the land is rent-free, or, in other words, that the entry in the Record of Rights that it is liable to pay rent has been rebutted. A perusal of the judgment makes it clear that he placed the onus of proving the rent-free nature of the holding on the defendant.

The last contention would seem to be that the learned Judge was not correct in holding that long possession without payment of rent raises the presumption of a rent-free title. It, no doubt, would have been more correct to say that long and uninterrupted possession without the payment of rent entitles the Courts to presume or perhaps more correctly to infer that the original grant was a rent-free one and I think, reading the judgment as a whole, this is what the learned Judge meant.

No doubt, in one portion of his judgment, he uses the expression that long possession without paying rent raises the presumption of a rent-free title, but before this he had after discussing the evidence and finding that defendant had never paid rent remarked that in such circumstances the proper inference to be drawn was that the defendants held under a rent-free title. The learned Judge in dealing with the case had before him the decision of this Court reported as *Biprodas Pal Choudhury* v. *Monorama Debi* (2) and *Nawab Ali* v. *Birendra Kishore Monikya Bahadur* (3) where the law is stated on the particular point and I have no reason to think he misunderstood these decisions.

Lastly, it was argued that the plaintiff's right as proprietor having been admitted it was for the defendant to show that he had a rent-free title. I think that is what the learned Judge has done. He has gone into the case of the defendants that it is *nishkar* and having found that proved then

(1) 7 C. 293; 3 Ind. Dec. (N. S.) 737.

(2) 47 Ind. Cas. 49; 22 C. W. N. 396; 45 C. 574.
(3) 24 Ind. Cas. 424; 22 C. L. J. 124.

states that the *zemindars* must then prove that it is rent-paying. He has for his authority in so dealing with the case a decision of this Court [see *Biprodas Pal Choudhury* v. *Monorama Debi* (2).]

This objection has no substance.

I would, therefore, dismiss the appeal with costs.

The result is that the appeal fails and is dismissed with costs.

Mukerji, J.—This appeal arises out of a suit for assessment of rent and for recovery of arrears of rent. The plaintiff's case is that the defendants are in possession of the lands in suit under him, in ordinary *jote* right and they have been recorded in the finally published Record of Rights as "*madhya satyadhikaris*," that is to say, tenure-holders who do not pay any rent but are liable to be assessed with rent. The defendants alleged that the lands are *nishkar brahmattar* and are not liable to be so assessed.

The Munsif decreed the suit, but on appeal the Subordinate Judge has dismissed it. The plaintiff has preferred this second appeal.

A preliminary objection was taken to the competency of the appeal on the ground that it is barred by reason of the provisions of s. 153 of the Bengal Tenancy Act. I am of opinion that this objection should be overruled, as the decree appealed from, by overruling the plaintiff's contention as to his right to have the rent assessed and giving effect to the defendants' contention that they had a *nishkar brahmatter* right, in a suit in which assessment of rent was claimed, decided a question of the amount of rent annually payable.

On the merits I have the misfortune to differ from the order which my learned brother desires to pass in this appeal. I am clearly of opinion that the appeal should succeed, and that upon two main grounds, if not on a third ground as well.

The first ground is to the effect that the entry in the Record of Rights as regards the assessability of the land to rent creates a presumption in plaintiff's favour and that presumption has not been taken into account at all by the learned Subordinate Judge. The learned Judge has referred to the Settlement Records in three places in his judgment: once when he has set out the plaintiff's case, again when he has remarked that the lands are recorded as *jote* of Gopinath (the grandfather of the defendants), and a third time when he has adverted to the fact that the defendants were recorded as being in possession of the land. There is nothing to indicate that he had in his mind the presumption which the entry creates or that he has thrown this presumption into the scale when weighing the evidence. The respondents' answer to this contention is two-fold. It is said in the first place that every Subordinate Judge, and especially this learned Judge who, it is said, is an officer of great experience, must be supposed to know that such a presumption arises under the law and, therefore, it must be supposed that he has taken it into account. In the next place it is said that the plaintiff himself disputed the correctness of the entry in so far as it records the defendants as tenure-holders and, therefore, did not rely on it, and under such circumstances the presumption does not arise. As regards the first answer it is true that every Judge is presumed to know the law that he administers; so also is every litigant; but we can only go by the judgment which is before us. The law enjoins that the Judge in dealing with a case which is open to appeal must give his reasons for his decision. If in the decision no reference is made to such an important presumption of law as this and if from nothing that has been expressed in or can be implied from the decision it can be gathered that the Judge had it in his mind, I find myself unable to act upon a mere supposition of this character. As regards the second answer it is not correct to say that the plaintiff himself repudiated the entry; only he did not rely on that part of it which related to the defendants' status. In the plaint the portion of the entry relating to the assessibility of the lands has been relied upon; and even assuming that the other portion, namely, that relating to the defendants' status, was falsely alleged to be wrong, the plaintiff cannot be penalised by being deprived of the presumption which necessarily arises in his favour under the law.

The second ground relates to the admissibility and evidentiary value of the recital in the *kobala* Ex. A. The learned Subordinate Judge observes thus with reference to this document: "The *kobala* Ex. A, dated 31st *Aswin* 1281, shows that in that year Gopinath's son Govinda (meaning the father of the defendants) purported to sell the plaint lands along with other lands to

his sister alleging that the lands were his *nishkar brahmattar* and that his father Gopinath was in possession of those lands in *nishkar* right. The evidence shows that notwithstanding the *kobala* Govinda did not part with the possession of the plaint land. From this it is urged that the *kobala* was a *benami* document and has no value. It may be a *benami* document, but the recital in the *kobala* has some value having been made by a person in possession so far back as 1281."

Unfortunately the decided cases bearing on this point are not uniform and do not profess to give sufficient reasons for holding that a particular document is or is not admissible; and I may also say, with the utmost deference, that in some of them is noticeable a confusion between admissibility of evidence and the value of it. I propose to refer to some of them presently, but I would prefer to deal with the section first. In the words of Garth, C. J., in the case of *Gujja Lall* v. *Fatteh Lall* (4) "a transaction is a business or dealing which is carried on or transacted between two or more persons." That a deed is evidence of a transaction cannot be disputed; the very illustration to the section shows that it is. The sale-deed, therefore, is evidence of a transaction which may come in under cl. (*a*) of s. 13 if the requirements of that clause are satisfied. That clause runs in these words: "Any transaction by which the right or custom in question was created, claimed, modified, recognised, asserted or denied or which was inconsistent with its existence." The question being whether the defendants have a *nishkar brahmattar* right, a deed conferring the *nishkar brahmattar* right on the defendants' predecessor would be admissible as a transaction by which the right was "created," but not a sale-deed executed by the defendants in respect of that right. The word "claimed" need not be considered, as the word implies a demand which involves the presence of the party against whom such demand is made and who may have an opportunity either to comply with it or refuse it. There is no question of "modification," "recognition" or "denial" in such a case as that of a deed of sale. The sale of a right is not inconsistent with the existence of the right but is, on the other hand, inconsistent with its non-existence. The deed, however, is a transaction in which the right is asserted, for the sale involves an assertion of the existence of the right. As pointed by Geidt, J., in the case of *Bansi Singh* v. *Mir Amir Ali* (5) the word "by" and not "in" appears in the clause and that stress should be laid on the use of the word "by" in this clause is also the view expressed by Seshagiri Aiyar, J., in the case of *Saripalli Venkatarayagopala Raju* v. *Fota Narasayya* (6). The question, therefore, arises whether the assertion of the *nishkar brahmattar* right in the deed is an assertion of that right by the transaction constituted by the deed; or, in other words, was this right asserted by the business or dealing as between the vendors and the vendee in respect of this deed. I am of opinion that it is not; the transaction is one by which the vendor asserted his competency to transfer the property, that is to say, that he had such interest in the property as would enable him to sell it, but that is all, and by this transaction the other incidents of the right are not asserted. The deed, therefore, does not come within cl. (*a*). To turn now to cl. (*b*). The wording of this clause is different from that of cl. (*a*) in several respects. It speaks in the first place of "particular instances" showing that evidence to be admissible must relate to such "instances" as distinguished from "transactions." An instance of the creation or modification of a right or custom would be inconceivable apart from the transaction by which it was created or modified and so the words "created" and modified are omitted in cl. (*b*). There may be a transaction by which there has been the recognition of a right or custom, there may also be particular instances of its recognition, and so "recognised" appears in both the clauses. Instead of the words, by which the right or custom is asserted or denied or which was inconsistent with its existence, we have the words "in which the right or custom was exercised or in which exercise was disputed, asserted or departed from." It is clear that in cl. (*b*) instances of assertions or denials of right or custom do not come in, but only instances of its exercise or instances when its exercise was disputed, asserted or departed from. Can any conceivable ground be suggested why if a mere assertion or denial in respect of a

(4) 6 C. 171; 6 C. L. R. 439; 3 Shome L. R. 132; 3 Ind. Dec. (N. S.) 112 (F. B.).

(5) 11 C. W. N. 703.

(6) 26 Ind. Cas. 747; (1914) M. W. N. 779.

right or custom was to be evidence, no evidence of "particular instances" of such assertion or denial could be given and yet evidence would be admissible in respect of "transactions" in which there has been such assertion or denial? I fail to see any. I am, therefore, of opinion that a transaction or instance in which there is a mere assertion or denial of a right or custom does not come within s. 13 but only such a transaction is admissible by which the right or custom is asserted or denied. It has been urged that the illustration militates against this view, but I do not see that it does. The illustration speaks of a case where the question is whether *A* has a right to a fishery. In such a case a deed conferring the fishery on *A's* ancestors should be a transaction by which a right to the fishery was created; so a mortgage by *A's* father would be a transaction by which a right to the fishery would be asserted; and so also a subsequent grant of the fishery by *A's* father irreconcilable with the mortgage. All these would come under cl. (*a*). Instances in which *A's* father exercised the right or in which the exercise of the right was stopped by *A's* neighbour would come under cl. (*b*). The reason of the rule why instances of exercise of the right are admissible has been clearly explained by Parke, B., in *Jones* v. *Williams* (7): "The ground on which such acts are admissible is not the acquiescence of any party: they are admissible of themselves, *proprio vigore*, for they tend to prove that he who does them is the owner of the soil; though if they are done in the absence of all persons interested to dispute them, they are of less weight." Recitals in a deed are not transactions but instances of assertions or denials of the existence of the right. They come neither under cl. (*a*) nor under cl. (*b*). They are statements which unless they are relevant under some other provisions of the law, *e. g.*, as admissions or statements of deceased persons, etc., are not admissible in evidence. In the case of *Brajeswari Peshakar* v. *Budhanudi* (8), Garth, C. J., observed thus: "A recital in a deed or other instrument is in some cases conclusive and in all class of cases evidence as against the parties who make it.....But it is no more evidence as against other persons than any other statement would be." The Judicial Committee in the case of *Nanda Lal Dhur Biswas* v. *Jagat Kishore Acharjya* (9) observed thus: "Under ordinary circumstances and apart from Statute, recitals in deeds can only be evidence as between the parties to the conveyance and those who claim under them."

As has been observed by a very learned Judge where a document is admitted in evidence of a transaction the parties are often apt to refer to the recitals therein as relevant evidence, and the distinction between the deed as a transaction and the recitals contained in the deed is frequently overlooked. In the case of *Dwarka Nath Bakshi* v. *Mukunda Lal* (10) which was a case in which a deed of sale and a mortgage-deed, though not *inter partes* containing recitals that a particular land belongs to a particular *howla*, were sought to be admitted in a suit in which the question was whether the land belonged to that *howla* or not, as far as can be made out of the facts from the report of the case, they were documents executed by strangers in favour of one of the defendants to the suit who was a co sharer of the other defendants whose share the plaintiff's father had purchased at an execution sale. Rampini, J., purporting to rely upon the cases of *Daitari Mohanti* v. *Jugo Bundhoo Mohanti* (11) and *Vythilinga* v. *Venkatachala* (12) held that they were admissible under s. 11 (*b*) and s. 13 of the Evidence Act, and observed that they may be very weak evidence or even of no weight at all, but they could not be rejected as inadmissible. Geidt, J., held that they were admissible as transactions by which the right to hold the land as part of the *howla* was recognised. This decision, however, was treated as *obiter* in a later case of this Court, namely, that of *Abdul Ali* v. *Syed Rejan Ali* (13) in which the cases of *Daitari Mohanti* v. *Jugo Bundho Mohanti* (11) and *Vythilinga* v. *Venkatachala* (12) were distinguished and it was thus observed: "We know of no authority for saying that a private transaction between persons who have no power to bind a person whose rights it is

(7) (1837) 2 M. & W. 326; 1 M. & H. 51; 6 L. J. Ex. 107; 150 E. R. 781; 46 R. R. 611.
(8) 6 C. 268; 7 C. L. R. 6; 3 Ind. Dec. (N. S.) 175.
(9) 36 Ind. Cas. 420; 44 C. 186; 21 C. W. N. 225; 20 M. L. T. 335; 31 M. L. J. 563; (1916) 2 M. W. N. 336; 4 L. W. 458; 18 Bom. L. R. 868; 14 A. L. J. 1103; 24 C. L. J. 487; 1 P. L. W. 1; 10 Bur. L. T. 177; 43 I. A. 249 (P. C.).
(10) 5 C. L. J. 55.
(11) 23 W. R. 293.
(12) 16 M. 194; 5 Ind. Dec. (N. S.) 842.
(13) 21 Ind. Cas. 618; 19 C. W. N. 468.

sought thereby to affect can be admitted as evidence against him; and the obvious dangers that might arise from such a proceeding make us very unwilling to hold that a transaction is one that comes under s. 13 unless we are obliged to." The authority of the decision in the case of *Dwarka Nath Bakshi* v. *Mukunda Lal* (10) has been doubted in the more recent decisions of this Court, *e. g.*, *Saroj Kumar Acharji* v. *Umed Ali* (14) and *Pramatha Nath Choudhuri* v. *Krishna Chandra Bhattacharjee* (15) though the latter two cases, in my opinion, are clearly distinguishable from that case. In *Sabran Sheikh* v. *Udoy Mahto* (16) the learned Judges of the Patna High Court in a suit in which the plaintiffs claimed some land as their *mal* land and the defendant claimed it as his *jote*, an *ekrarnama* addressed by a third person to an ancestor of the plaintiff in which the land was described as *mal* land was held admissible both under cl. (*a*) and cl. (*b*) of s. 13, on the ground that it was a transaction in which the right was claimed and an instance in which the right was exercised. In this decision the authority of the decision in *Abdul Ali* v. *Syed Rejan Ali* (13) was doubted and the reliance was placed amongst others upon the cases of *Daitari Mohanti* v. *Jugo Bundhoo Mohanti* (11) and *Vythilinga* v. *Venkatatachala* (12) and also upon the decision in *Jones* v. *Williams* (7). In a later decision of this Court in the case of *Jnanendra Nath Dutt* v. *Nasea Dasi* (17) which was a suit by a landlord against a tenant who claimed a permanent tenure, Rankin, J., held that an assertion in the *kobala* executed by a tenant in favour of his transferee that his right in it was a permanent one was admissible under s. 13. It will serve no useful purpose to refer to other cases bearing on the point, as the conflict in the decisions it is impossible to reconcile.

Now, whatever may be the correct view as regards the admissibility of the *kobala* or of its recitals I do not think it can be ever urged that the recitals contained therein can go in evidence under s. 13 in view of the fact that the transaction was held by the Munsif to be a *benami* one, and the Subordinate Judge has not dissented from that view. The learned Judge was of opinion that the recital has some value. He must have taken that value of it into his consideration, and if he has done so his judgment must have been affected by it. I am not prepared to read his judgment as I have been asked to do, as meaning that the recitals had no value, in the face of the express statement in the judgment that they had some value. A transaction contemplated by s. 13 is a genuine and *bona fide* transaction, but a *benami* transaction which is one not meant to be acted upon is a fictitious transaction and in the eye of law is no transaction at all. Such a transaction, in my opinion, cannot be let in as evidence in proof of a right or custom. The plaintiff, in my judgment, can legitimately complain, if this piece of evidence has been used against him. The argument that the document was admitted without objection and, therefore, its admissibility cannot be challenged now does not appeal to me as it is difficult to imagine that the appellant could foresee that the recitals would be used as evidence against him.

The third ground is one about which I am not so very definite. That relates to the onus of proof. There are passages in the judgment of the learned Subordinate Judge which may be taken as suggesting that he has mixed up the case of a contest between a *zemindar* and a tenant, the former claiming an alleged *lakheraj* tenure as being included within his *mal* lands and on that ground claiming rent from the latter, and a case like the present one in which a rent-free title is claimed by a tenant in defence to a suit for rent. There are passages also which would indicate that the learned Judge was relying upon the failure on the part of the plaintiff to prove that he ever realised rent from the defendants as negativing his claim for assessment and recovery of rent. There is also a vein of reasoning running through the judgment of the learned Judge suggesting that non-realisation of rent for a long series of years, during which the tenant is in possession, raises, as if in law, a presumption of a rent-free title in the latter, and in support of this position two cases have been cited and relied upon. Those cases, however, appear to have been decided on their own special facts. On

(14) 63 Ind. Cas. 954; 25 C. W. N. 1022; 35 C. L. J. 19; A. I. R. 1922 Cal. 251.
(15) 84 Ind. Cas. 420; 28 C. W. N. 1092; A. I. R. 1924 Cal. 1067.
(16) 70 Ind. Cas. 18; 1 Pat. 375; A. I. R. 1922 Pat. 483; 3 P L. T. 792; (1923) Pat. 125.
(17) 83 Ind. Cas. 948; 39 C. L. J. 526; A. I. R. 1924 Cal. 991.

the other hand, it is not impossible to take the view that the Judge has kept in view the fact that the onus is on the defendants and that from the fact that they have been in possession for a long series of years without payment of rent—a circumstance which called for some explanation from the plaintiff and in respect of which no explanation was offered by him and possibly from other facts as well the learned Judge drew the inference, as he was entitled to do, that there was a contract or grant which created a rent-free title in the defendants. If this ground, therefore, had stood alone I should not have been prepared to interfere with the decree of the learned Subordinate Judge. As, however, I am of opinion that the decree should be set aside on the other two grounds to which I have referred, I would remand the case to the Court of Appeal below in order that the whole appeal may be re-heard and disposed of in accordance with law and in the light of this my judgment. Costs of this appeal will abide the result.

Babu *Brojo Lal Chuckerburty*, Dr. *Naresh Ch. Sen Gupta*, Babus *Kamani Mohon Chatterji* and *Kebati Mohan Chatterji*, for the Appellant.

Mr. *Gunoda Charan Sen* and Babu *Birendra Kumar De*, for the Respondents.

JUDGMENT.

Sanderson, C. J.—*(June 16, 1926).*—This is an appeal under the Letters Patent of this Court from a decision of my learned brother Mr. Justice Cuming.

The suit was brought by the plaintiff for assessment of rent and for the recovery of arrears.

The learned Munsif, who tried the case, decided that the plaintiff was entitled to recover rent for the period in suit at the rate of Rs. 4-6-8 with usual cesses and damages therein and that he should recover enhancement at the progressive rate mentioned in the judgment.

The defendants appealed and the learned Subordinate Judge allowed the appeal and dismissed the suit. He held that the lands in suit were not liable to be assessed with rent.

At the hearing of the appeal in the High Court, my learned brother Mr. Justice Cuming was of opinion that the appeal should be dismissed and my learned brother Mr. Justice Mukerji was of the opinion that the matter should be remanded to the lower Appellate Court in order that the appeal might be re-heard and disposed of in accordance with law in the light of the learned Judge's judgment.

The result was that the opinion of Mr. Justice Cuming prevailed and the appeal was dismissed. Consequently the plaintiff has appealed under the Letters Patent to this Court.

Three main matters were argued by the learned Vakil who appeared for the plaintiff.

The first was that the learned Subordinate Judge had improperly relied upon a recital in a *kobala* which was marked Ex. A and dated the 31st of *Aswin* 1281 *B. S.*, which corresponds to the year 1874. That was a document, whereby one of the defendants' predecessors, Govinda by name, purported to sell the plaint lands with other lands to his sister alleging that the lands were his *nishkar brahmattar* and that his father Gopinath was in possession of these lands in *nishkar* right.

Both the lower Courts seem to have come to the conclusion that this was a *benami* document, but the learned Subordinate Judge considered that, even though it were a *benami* document, the recital in the *kobala* had some value, having been made by the person in possession so far back as 1874.

Both the learned Judges of the Division Bench of this Court agreed that the recital in the *kobala* should not have been admitted in evidence.

My learned brother Mr. Justice Cuming, however, was of the opinion that the admission did not vitiate the decision of the lower Appellate Court. He came to the conclusion that the Court did not rely upon this piece of evidence in coming to its decision. He thought that the judgment was really based on the inference which the Court drew from the long and uninterrupted possession without paying rent.

On the other hand, my learned brother Mr. Justice Mukerji came to the conclusion that it was impossible to what extent the learned Judge's mind was influenced by this piece of evidence which was improperly admitted.

There is no doubt about the principle upon which this matter should be dealt with. That has been laid down by this Court in the case of *Womes Chunder Chatter-*

jee v. *Chundee Churn Roy Chowdhry* (1). The learned Chief Justice said at page 295*: "The 167th section of the Evidence Act provides that 'the improper admission of evidence shall not be ground of itself for a new trial, if it shall appear to the Court before which the objection is raised, that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision.' It seems to me, however, that there is great difficulty in applying the provisions of this section to the generality of cases which come before the High Court on second appeal, and the difficulty arises thus.

"On second appeal we have no power to deal with the sufficiency of the evidence; we have only a right to entertain questions of law. And our duty being thus confined, it seems to me, that when evidence has been wrongly admitted by the Court below, the Court has, generally speaking, no right to decide, whether the remaining evidence in the case, other than that which has been improperly admitted, is sufficient to warrant the finding of the Court below.

"We cannot decide that question, as it seems to me, without examining in detail that other evidence, and determining, as a question of fact, whether it is sufficient of itself to warrant the lower Court's finding."

My learned brother Mr. Justice Cuming did not act on that principle. The evidence was not examined by the Division Bench but the learned Judge apparently relied upon the further observation of the learned Chief Justice at page 296* where he is reported to have said as follows:—"On further consideration, I think that the only cases, which we may with propriety dispose of under such circumstances without a remand, are those where, independently of the evidence improperly admitted, the lower Court has apparently arrived at its conclusion upon other grounds. Where this appears pretty clearly from the judgment, a remand is unnecessary, because then the error committed by the lower Court has not affected the decision upon the merits."

I regret that I am unable to agree with my learned brother Mr. Justice Cuming on this part of the case. I say "regret" because I should have liked to have agreed with him and disagreement with him means that this case has to be remanded.

*Pages of 7 C.—[*Ed.*]

But I am unable to say that it is apparent from the judgment of the learned Subordinate Judge that he decided the case upon other evidence independently of the recital in the *kobala* to which I have referred.

The second point is that the lands in suit were recorded in the Record of Rights as being in the possession of the defendants or their predecessors with the remark that the lands were liable to be assessed with rent although no rent had been paid.

The entry to which I have referred is, under the provisions of s. 103B of the Bengal Tenancy Act, evidence of the matter referred to in such entry and it shall be presumed to be correct until it is proved by evidence to be incorrect.

I have read the judgment of the learned Subordinate Judge more than once and although he referred to the entry in the Record of Rights three times, I am not satisfied that he approached the case from the right point of view having regard to the provisions of s. 103B. In the first place, he referred to the entry when he stated the plaintiff's case at the beginning of his judgment. The second time he referred to the Settlement proceedings and stated that the lands were recorded as *jote* Gopinath and the third time he stated that during the Cadastral Survey the lands were recorded in the defendants' possession. Except when he was dealing with the statement of the plaintiff's case, the learned Subordinate Judge referred to the entry in the Record of Rights merely for the purpose of showing that the lands were in the possession of the defendants and their predecessors.

I agree with my learned brother Mr. Justice Mukerji that the learned Subordinate Judge does not seem to have approached this case from the point of view that the entry in the Record of Rights had to be accepted as correct until it had been proved by evidence to be incorrect.

For these two reasons I agree with my learned brother Mr. Justice Mukerji that this case ought to be remanded.

I do not lay much stress on the third point which was referred to by the learned Vakil because I think that it is quite open to this Court to read the learned Subordinate Judge's judgment as meaning that upon the evidence he inferred that there had been a grant of rent-free title to the defendants' predecessors.

The result is that, in my judgment, the order of Mr. Justice Cuming should be set aside and the case should be remanded to the lower Appellate Court in order that the appeal may be re-heard and decided in accordance with law.

I endeavoured to see whether it was possible for this Court to determine the issue of fact and to dispose of this appeal without remanding it. I find that under s. 103 of the C. P. C., the power of the High Court with regard to such an appeal as this is limited.

The issue of fact in this case was determined by the Court below; and we have no jurisdiction to dispose of the appeal finally here much as I should have liked so to do.

As regards the costs of the hearing before the Division Bench Mr. Justice Mukerji's directions will stand, and there will be no order as to costs of the Letters Patent Appeal. Costs of the first hearing in the lower Appellate Court will abide the event of the second hearing.

Panton, J.—I agree.

Graham, J.—I agree.

FINAL JUDGMENT.

Sanderson, C. J.—(*June 25, 1926*).—This is a re-hearing of the Letters Patent Appeal No. 6 of 1926. It was heard by my learned brothers and me on the 16th of this month, and this Court came to the conclusion that the order which was suggested by my learned brother Mr. Justice Mukerji should be carried out, namely, that the case should be remanded to the lower Appellate Court in order that the appeal might be re-heard, and we expressed regret that we were not able to decide finally the matters which were in controversy because of the limitation involved in the provisions of s. 103 of the C. P. C.

My learned brother Mr. Justice Panton and I had signed the judgment but my learned brother Mr. Justice Graham had not signed it. We then discovered that Act VI of 1926, which amended s. 103 of the C. P. C., had come into force in February, 1926, and consequently was in force at the time when we heard the appeal. My learned brothers and I considered that this Court had jurisdiction to re-hear the appeal and decide the case in accordance with the provisions of the amended s. 103 and both the learned Advocates who appear for the respective parties in this appeal have agreed that this Court has jurisdiction to re-hear it.

Section 2 of Act VI of 1926 provides as follows:—"In s. 103 of the C. P. C., 1908, for the words 'but not determined by the lower Appellate Court' the words 'which has not been determined by the lower Appellate Court or which has been wrongly determined by such Court by reason of any illegality, omission, error or defect such as is referred to in sub-s. (1) of s. 100' shall be substituted."

In view of that alteration I have no doubt that this Court has jurisdiction to decide finally issues with which this Court dealt in its judgment on the 16th of June, 1926.

The main issue in the case is whether the entry in the Record of Rights has been shown to be incorrect.

The entry in the Record of Rights with regard to the property in suit is as follows:—"Rent assessable but not taken and realised." That Record of Rights was finally published in the year 1913. No steps were taken on behalf of the defendants to have that entry in the Record of Rights corrected or altered, and it was not until 1922 when the plaintiff brought this suit for the purpose of recovering rent from the defendants that the defendants for the first time asserted that the entry in the Record of Rights was incorrect.

The provision relating to this matter is s. 103B (5) of the Bengal Tenancy Act and it is so well-known that it is hardly necessary to read it. The words are as follows:—"Every entry in a Record of Rights finally published shall be evidence of the matter referred to in such entry, and shall be presumed to be correct until it is proved by evidence to be incorrect."

The only question in this case, which I think it is necessary to consider at present, is whether the defendants by the evidence, which has been produced in this case, have shown that the entry in the Record of Rights is incorrect.

The defendants rely principally upon two matters, first, that they and their predecessors have been in possession of the land in suit for a long period and, secondly, that they have not paid any rent.

The time during which the defendants have been in possession, in my judgment, has been left indefinite and I am not prepared to hold that, when the period, during which the defendants have been in possession is left in an indefinite and nebulous state, that is sufficient, even when taken with the fact that no rent has been paid, to

show that the entry in the Record of Rights is incorrect.

The learned Advocate who appeared for the respective parties in this case have dealt with the evidence on the one side and on the other and have drawn our attention to the material documents, but I am not prepared to say that the defendants have succeeded in showing that the entry in the Record of Rights is incorrect.

The result, in my judgment, is that the decree of the lower Appellate Court must be set aside and that the judgment of the learned Munsif in this respect must be restored.

A further point, however, was taken by the learned Advocate for the defendants, namely, that the learned Munsif was wrong in holding that the rent was liable to be enhanced under s. 30 (*b*) of the Bengal Tenancy Act at the progressive rate which is mentioned in his judgment. It was pointed out bv the learned Advocate that the learned Munsif in an earlier part of his judgment had proceeded in accordance with the provisions of s. 7 of the Bengal Tenancy Act, which is a section in the Chapter which relates to tenure-holders. He further drew our attention to the entry in the Record of Rights, which being translated is "holder of a middleman's interest," and he further relied upon the finding of the learned Munsif that the plaintiff's contention that the defendants were ordinary occupancy-holders was incorrect. He, therefore, argued that the learned Munsif was wrong in applying s. 30 (*b*) to this case.

The learned Advocate for the plaintiff in his reply was constrained to admit that there was really no answer on this part of the case to the argument which had been advanced on behalf of the defendants.

In my judgment, the argument on behalf of the defendants in this respect is correct.

Consequently the decree in this case must be confined to the decree that the plaintiff is entitled to recover for the period in suit rent at the annual rate of Rs. 4-6-8 with the usual cesses and damages therein.

The parties will pay their own costs in all the Courts.

Panton, J.—I am of the same opinion.

Graham, J.—I am also of the same opinion.

Z. K. *Decree set aside.*

OUDH CHIEF COURT.

SECOND CIVIL APPEAL No 243 OF 1926.

November 9, 1926

Present:—Mr. Justice Raza.

SUCHIT AND OTHERS—DEFENDANTS—APPELLANTS

versus

Sheikh MOHAMMAD HABIB ULLAH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 142—Suit for possession of land and removal of trees—Limitation—Estoppel—Acquiescence, what amounts to—Appeal, second—Finding of fact, erroneous, whether binding.

A finding of fact based upon admissible evidence must be accepted in second appeal even though it is erroneous. Acquiescence implies that the person who is said to have acquiesced did so with knowledge of his rights and the other person acted in the *bona fide* belief that he was acting within his rights. The absence of either of these elements makes the doctrine inapplicable. The acquiescence, which will deprive a man of his legal rights, must amount to fraud. [p. 200, col. 1.]

A suit for possession of land coupled with an ancillary prayer for the removal of the trees planted on it is governed by Art. 142 of Sch. I to the Limitation Act. [*ibid.*]

Second appeal against the judgment and decree passed by the Sub-Judge, Bara Banki, dated the 25th February, 1926, reversing the decree of the Munsif, Ramsanahighat, at Bara Banki, dated the 23rd September, 1925.

Mr. *K. P. Misra* for Dr. *J. N. Misra*, for the Appellants.

Mr. *M. Wasim*, for the Respondents.

JUDGMENT.—This is an appeal from a decree of the Subordinate Judge, Bara Banki, dated the 25th February, 1926, setting aside a decree of the Munsif, Ramsanahighat at Bara Banki, dated the 23rd September, 1925.

The dispute in this case relates to certain plots in village Khizirpur Hamlet of Saidanpur in the District of Bara Banki. The plaintiffs, who are *talukdars* of the village, sued for possession of the plots in dispute by removal of certain trees alleging that the defendants had planted them wrongfully without their permission and consent between July, 1923 and July, 1924. The defence was that the trees would not be uprooted or removed as they were planted about 8 years ago with the permission of Sheikh Azmatullah, father of the plaintiff No. 2, and also because the plaintiffs owing to their acquiescence, were estopped from bringing the present suit.

The suit was dismissed by the first Court; but the plaintiffs' appeal was allowed by the learned Subordinate Judge. The de-

fendants have now come to this Court in second appeal.

So far as I see, there is no force in this appeal. The learned Subordinate Judge has found that with the exception of 3 or 4 trees all the trees were planted recently between one to three years of the suit. He has found also that the trees in dispute were not planted with the permission of the father of the plaintiff No. 2 as alleged by the defendants. These findings are findings of facts based upon admissible evidence and must be accepted in second appeal. There is no jurisdiction to entertain a second appeal on the ground of even an erroneous finding of fact, however gross or inexcusable the error may seem to be. The learned Subordinate Judge has subjected the whole evidence in this case to a careful analysis and has come to the conclusion that the defendants have entirely failed to prove the alleged permission and that the trees in dispute were planted only recently. It is neither alleged nor shown that the plaintiff No. 1 ever granted permission to the defendants to plant any trees on the plots in suit.

As to the plea of estoppel, I think the defendants have failed to establish that plea also. The learned Subordinate Judge was perfectly right in giving his finding against the defendants on that point also. Acquiescence implies that the person who is said to have acquiesced did so with knowledge of his rights and the other person acted in the *bona fide* belief that he was acting within his rights. The absence of either of these elements makes the doctrine inapplicable. The acquiescence, which will deprive a man of his legal rights, must amount to fraud. This the defendants have failed to establish in this case.

I should like to note that the ages of trees are of no importance in the present suit which is a suit for possession of the plots in dispute. There is no question of limitation to be considered in this case, even granting that the trees were planted more than three years ago. As pointed out in the case of *Ghafur Khan* v. *Prag Narayan* (1) "a suit for possession of land coupled with an ancillary prayer for the removal of the trees planted on it is governed by Art. 142, Sch. I of the Limitation Act." The ruling in *Ram Autar* v. *Nabi Bakhsh* (2) is also in favour of the plaintiffs on this point. I think the judgment of the learned Subordinate Judge is perfectly right and no case has been made out to disturb it, in second appeal.

The result is that the appeal fails and must be dismissed. I dismiss the appeal with costs. The decree of the lower Appellate Court is confirmed in all respects.

Z. K. *Appeal dismissed.*

(1) 66 Ind. Cas. 799; 9 O. L. J. 17; A. I. R. 1922 Oudh 47.

(2) Select Case No 213.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 179 OF 1924.

June 10, 1926.

Present:—Justice Sir Ewart Greaves, Kt., and Mr. Justice Mukerji.

ASHUTOSH LAHIRI—PLAINTIFF—APPELLANT

versus

CHANDI CHARAN MITRA—DEFENDANT—RESPONDENT.

Construction of document—Lease—Indefinite term—Surrounding circumstances, whether can be looked at—Period of lease.

Where a grant of property is made to a person for an indefinite period it enures, generally speaking, at least for the lifetime of the grantee, unless there are some words in the grant showing the intention that a heritable grant is made. [p. 202, col. 2.]

A lease provided as follows:- "You having applied to get settlement of 6 *kanis* of land, as described in the schedule below for the purpose of constructing your *basha*, I hereby fix annual rent for the said 6 *kanis* of land at Rs. 3 and settle the same with you; you shall enjoy and possess the said land by constructing your *basha* and residing therein, regularly paying the rent. To this effect I execute this *pottah*." A substantial sum was paid by the lessee to the lessor as *nazrana* for the lease and after the execution of the lease the lessee erected substantial structures upon the land and thereafter there were two transfers of the lessee's interest with regard to one of which the landlord's fees were paid by the transferee at the time when the deed of transfer was registered:

Held, (1) that the lease not being for any fixed term and there being no term of inheritance, it was a lease neither for a definite term nor one expressly for perpetuity and that it was open to the Court to look into the surrounding circumstances in order to determine the period for which the lease was granted; [p. 201, col. 2.]

(2) that having regard to the terms of the lease and the surrounding circumstances the lease must be held to enure at least for the lifetime of the grantee [*ibid.*]

Appeal against a decree of the Subordinate Judge, Rungpur, dated the 13th September, 1923, affirming that of the Munsif of that place, dated the 22nd July, 1922.

Mr. *Rishindra Nath Sarkar* and Babu *Abani Nath Bose*, for the Appellant.

Mr. *Girija Prasanna Sanyal* and Babu *Indu Prokash Chatterjee*, for the Respondent.

JUDGMENT.

Mukerji, J.—This appeal arises out of a suit which was instituted by the plaintiff who is the appellant before us for recovery of *khas* possession in respect of a piece of land on ejecting the defendant who had been holding the same. The suit was instituted after service on the defendant of a notice to quit on the footing that the tenancy which forms the subject-matter of the suit was a tenancy-at-will or a tenancy from year to year. The suit has been dismissed by both the Courts below. It is necessary to state quite shortly some of the facts relating to this case in order to appreciate the contention that has been urged on behalf of the appellant in this appeal.

The plot of land belonged to one Uma Charan Majumdar who transferred his rights therein to one Chandi Charan Ray Choudhry in 1313 *B. S.* and Chandi Charan Ray Chaudhry in 1319 in his turn transferred the rights which he had acquired to one Ashutosh Lahiri who is the plaintiff-appellant before us. Prior to the transfer in favour of Chandi Charan, Uma Charan had by a *pottah* settled the disputed land with one Rajbullubh in 1304 *B. S.* Rajbullubh transferred the rights which he had obtained from Uma Charan to one Chandi Charan Mitra, the defendant-respondent in this appeal. The Courts below, as I have stated, have dismissed the plaintiff's suit holding that the notice which had been served on the defendant was a valid one and had been properly served if it be taken that the plaintiff was entitled to eject the defendant as a tenant-at-will or a tenant from year to year. They were, however, of opinion that the tenancy that was created by the document of 1304 to which I have referred was not a tenancy-at-will or a tenancy from year to year and it was a tenancy which in any event could enure for the lifetime of the grantee, the aforesaid Rajbullubh. The principal contention urged on behalf of the appellant before us is to the effect that upon a proper construction of the lease of 1301 it should have been held by the Courts below that the interest of the defendant was nothing more than that of a tenant-at-will or a tenant from year to year. This contention is sought to be supported by reference to a number of decisions of this Court and also to the terms of the document itself. Reference has also been made to another lease between the parties in respect of a piece of adjoining land. The question as to the nature of the interest which had been conveyed by this last mentioned document came up for consideration before this Court and was decided in one of the reported decisions upon which reliance was placed on behalf of the appellant.

The document of 1304 purports to run in these words: "You having applied to get settlement of 6 *kanis* of land, as described in the schedule below for the purpose of constructing your *basha*, I hereby fix annual rent for the said 6 *kanis* of land at Rs. 3 and settle the same with you; you shall enjoy and possess the said land by constructing your *basha* and residing therein, regularly paying the rent. To this effect I execute this *pottah*." It is clear, therefore, that the lease was not for any fixed term. There was no term of inheritance and it was a lease neither for a definite term nor one expressly for perpetuity. Having regard to the terms of the document which in themselves are not very clear it is competent to us to look into the surrounding circumstances and the surrounding circumstances as they were found by the Courts below appear to have been these:—That the lessee was to build his dwelling house on the land: that at the time when the lease was granted a substantial sum was paid by the lessee to the lessor as *nazarana* or premium for the grant: that after the execution of the lease the lessee erected, though, it is stated, with the permission of the lessor, some substantial structures upon the land and thereafter there were two transfers of the lessee's interest, with regard to one of which at least the landlord's fees were paid by the transferee at the time when the *kobala* in respect of the transfer was registered. The findings of the Courts below on the question as to whether there was acquiescence on the part of the lessor, with regard to the execution of the substantial structures on the land, are not clear; and I do not propose to rest my judgment on any finding with regard to that matter. Reading the lease and taking into consideration the other matters which arise upon the findings to which I have referred it seems to me that the intention of the parties was to make a grant in favour of the lessee which would enure for the lifetime of the lessee and so

long as the lessee would regularly pay the rent in respect of the premises. Reliance has been placed on behalf of the appellant upon a number of decisions of this Court, to the more important of which I shall now refer. The first one is the case of *Mohima Chandra Sarkar* v. *Anil Bandhu Adhicary* (1). That, however, was a case where there was a stipulation in the lease prohibiting the lessee from erecting masonry building or cutting down trees and in this respect the lease in that case seems to have been of an entirely different nature from the lease now before us. Another case referred to on behalf of the appellant is that of *Abdul Hakim Khan* v. *Elahi Baksha Saha* (2) in which upon a review of most of the earlier decisions on the question as to the circumstances under which the permanency of a grant may be inferred or not, this Court laid down certain principles on which such permanency might be inferred. It may be that judged by the test laid down in that case, the lease in question will fall short of the requisites necessary to show that in point of fact it was a permanent lease granted to the predecessor of the defendant, namely, Rajbullubh. That, however, is not the question for our consideration in the present appeal. The whole question here is as to whether the plaintiff has succeeded in showing that the interest of the defendant is only that of a tenant-at-will or of a yearly tenant. Another case has been referred to before us on behalf of the appellant and that is the case of *Chandi Charan Mitra* v. *Ashutosh Lahiri* (3) in which as I have already said the question as to the nature of another lease between the parties relating to an adjoining plot of land was considered by this Court. That lease ran in these words: "Within the aforesaid *jote*, 6 *kanis*, by guess of land mentioned in the boundaries below, being contiguous to your *basha*, you want the same for making it a part of the compound of your *basha*. Hence Rs. 3 being fixed as annual rent, I lease out the same to you. You will continue to possess and enjoy the aforesaid land after making the same part of the compound of your *basha* and paying rent regularly." It was held in that case by this Court that even if the lease with which we are now dealing in this appeal might have created a permanent right to the plot of land covered by it it did not necessarily follow that the same right was created in the other plot of land which adjoined the *basha* and to which the lease in that case related. It was held in that case that the plot of land was leased out to the defendant to be treated as a part of his compound; that it came within the purview of s. 106 of the Transfer of Property Act or rather the latter part of that section, and it was held that no permanent right was created by that lease. The terms of the document before us are different from those of the document which was considered by this Court in the case to which I have just referred: there the land was leased out for the purpose of being treated as a part of the compound of a *basha*: whereas in the present case it was leased out for the purpose of making a *basha* or homestead. The decision in that case, therefore, does not assist us in determining the question as to what are the rights of the parties under the lease which is the subject-matter for consideration here.

On behalf of the respondent it has been pointed out in the first place that the notice that was served upon him was not a valid one: but it is not necessary to go into that question in the view that I take of the lease that we have got to consider. It is not necessary to go further and find what are the exact rights of the parties under this lease. It is enough to say that it is not possible on a consideration of the terms of the lease or the circumstances to which I have already referred to hold that the lease had created only the interest of a tenant-at-will or of a yearly tenant. And in view of the terms of the lease it would be right, in my opinion, to apply to it the general rule of construction which is to the effect that if a grant is made to a man for an indefinite period it enures, generally speaking, at least for the lifetime of the grantee unless there were some words showing the intention that a heritable grant was made. It is enough for our purpose to say that we agree with the view taken by the Courts below to the effect that this tenancy under the lease is not a tenancy at-will or a yearly tenancy. It is not necessary to decide the question as to whether the tenancy is a permanent tenancy or not because it is quite clear that the tenancy

(1) 1 Ind. Cas. 66; 13 C. W. N. 513; 9 C. L. J. 362; 5 M. L. T. 297.
(2) 85 Ind. Cas. 103; 29 C. W. N. 138; A. I. R. 1925 Cal. 309; 52 C. 43.
(3) 91 Ind. Cas. 684; 53 C. 95; A. I. R. 1926 Cal. 558.

enures at least for the lifetime of the grantee Rajbullubh who appears to be alive at this time.

In this view of the matter I am of opinion that the decrees passed by the Courts below are correct and I dismiss the appeal with costs.

Greaves, J.—I agree.

Z. K. *Appeal dismissed.*

OUDH CHIEF COURT.

SECOND CIVIL APPEALS NOS. 65 AND 66 OF 1926.

November 1, 1926.

Present:—Mr. Justice Hasan.

RAM RAJ SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

TEJ SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Grove—Mortgage by grove-holder, whether constitutes abandonment—Landlord's right to re-enter—Sale and mortgage of tenancy, difference between.

The principle determining the title of a landlord to re-entry in the case of a sale by a tenant of his grove is essentially different from the principle applicable to a case where the tenant has made only a temporary alienation of the nature of a possessory mortgage. In the former case the sale is complete evidence of abandonment of the tenant's rights and the alienation being invalid, the vendee is a pure trespasser and the landlord acquires a right of re-entry. On the other hand where there is a transfer by way of a mortgage only it does not afford any evidence as to the extinction of the tenant's rights but on the contrary proves the continuance of such rights. [p. 204, col. 1.]

A mortgage by a grove-holder of his groves and trees contrary to the custom of the village or the conditions of the tenure does not, therefore, amount to abandonment so as to give the landlord a right to re-enter. [*ibid.*]

Ali Muhammad Khan v. *Chhedan* (1), relied on.

Jagmohan v. *Deputy Commissioner, Partabgarh* (2), distinguished.

Appeals from a decree of the Subordinate Judge, Gonda, dated the 6th November, 1925, modifying that of the Munsif, Tarabgunj, dated the 17th August, 1925.

Mr. *Mahabir Prasad* for Mr. *Aditya Prasad*, for the Appellants.

Mr *S. N. Srivastava* for Mr. *H. D Chandra*, for the Respondents.

JUDGMENT. — The first-mentioned appeal is the plaintiffs' appeal and the second-mentioned appeal is the defendants' appeal from the decree of the Subordinate Judge of Gonda, dated the 6th of November, 1925, modifying the decree of the Munsif of Tarabganj, dated the 17th August, 1925.

The suit, out of which these appeals arise, was brought by the plaintiffs for possession of grove No. 1070, a house, a well, two scattered trees and some bamboo clumps in village Khanpur, *Pargana* Nawabganj, in the District of Gonda. The plaintiffs are the *zemindars* of the village together with defendants Nos. 3 to 23. The ground of the claim is that the property in suit originally belonged to one Sarnam Singh, who held it in the character of a tenant, and on his death some years ago the co-sharers of the *patti*, in which the said property is situated, took possession and continued in possession till July, 1924, when the defendants Nos. 1 and 2, Tej Singh and Shehzor Singh, dispossessed them and entered into wrongful possession. The defence as it stands on the finding of the Courts below was that the property in question was held by Sarnam Singh as a tenant and that on his death he was succeeded in the right of inheritance by his sister's son, Ramkaran Singh who made a mortgage of the property in suit in favour of Tej Singh, defendant No. 1, and that the mortgage being valid the possession under it was lawful.

On the question which arose on these pleadings the Court of first instance held that the mortgage was invalid for the reason that according to the conditions relating to the tenure of the grove-holder as recorded in the *wajib-ul-arz* of the village the tenant had no right to make the mortgage in question. In result it granted a decree to the plaintiffs for joint possession of the property in suit. The defendant Tej Singh preferred an appeal from the decree of the Court of first instance. On this appeal the learned Subordinate Judge agreed with the finding of the trial Court that the mortgage in question was invalid but, on the authority of the decision in the case of *Ali Muhammad Khan* v. *Chhedan* (1) he held that the landlord did not establish any right of re-entry on such a transfer being made by the tenant. On this ground he accepted the defendants' appeal in respect of the grove and trees and dismissed the suit for possession in relation to them. As regards the house and the well he maintained the decree of the Court of first instance on the ground

(1) 15 Ind. Cas. 385; 15 O. C. 91.

that the defendant had failed to prove that the tenant was competent to transfer his right of residence in the house or his right of enjoyment of the well. From this decree of the learned Subordinate Judge the two cross-appeals now under consideration have arisen.

I am of opinion that the learned Subordinate Judge has rightly applied the principle of the decision in the case of *Ali Muhammad Khan* v. *Cheddan* (1) to the facts of this case. The *wajib-ul-arz* of the village in which the property in dispute is situated clearly provides for the right of inheritance in a tenant's grove. It follows, therefore, that on the death of the original grove-holder, Sarnam Singh, the grove and the trees in question devolved by right of inheritance on his sister's son Ramkaran Singh, who was his only heir under the law. On the view of law taken in the case just now mentioned, Ramkaran Singh's act of mortgaging the grove and the trees did not amount to an abandonment of his grove-holder's right in them. In support of the appeal it was argued that had the transfer in question been a sale according to the decision mentioned above and also according to the case of *Jagmohan* v. *Deputy Commissioner, Partabgarh* (2) and *Azmat-un-nissa* v. *Ganesh Parshad* (3) the landlord would be entitled to a decree for possession and that there was no valid distinction between the case of a sale and a possessory mortgage.

I am unable to accept the argument. In my judgment the principle determining the title of the landlord to a re-entry in a case of a sale by a tenant of his grove or of his house is essentially different from the principle applicable to a case where the tenant has made only a temporary alienation of the nature of a possessory mortgage. In the former case the sale is a complete evidence of the abandonment of the tenant's right in the property sold and the alienation being invalid the vendee is a pure trespasser as against the landlord, who on abandonment acquires in law a right of re-entry. On the other hand, where there is transfer by way of a possessory mortgage only it does not afford any evidence as to the extinction of the tenant's rights. On the contrary, it proves the continuance of such rights. It follows that in such a case the landlord has no right of re-entry though the mortgage is invalid according to the custom of the village or being contrary to the conditions of the tenure.

The learned Subordinate Judge's decree, therefore, in so far as the question of the grove and the two trees is concerned must be maintained. This disposes of the plaintiffs' Appeal No. 65 of 1926.

As regards the defendant's appeal, I am unable to appreciate the distinction on which the learned Subordinate Judge has founded his judgment in respect of the plaintiffs' suit in relation to the possession of the house and the well and his decision with regard to the grove and the trees. To my mind there is no such distinction. It may be assumed in favour of the landlord that the tenant had no power of transfer of the house and the well but it does not follow on the reasoning given in the judgment relating to the other appeal that the mortgage has the effect of giving a right of re-entry to the landlord.

The result is that the plaintiffs' Appeal No. 65 is dismissed and the defendants' Appeal No. 66 is allowed. The plaintiffs' suit is, therefore, dismissed in its entirety with costs in favour of the defendant No. 1, Tej Singh, in all the three Courts.

It may be that the plaintiffs are entitled to a declaration that the mortgage in question is invalid but neither the Courts below were asked to make such a declaration nor any request to that effect was made in this Court. In any event the judgment now delivered leaves no room for doubt that the mortgage is invalid.

Appeal No. 65 dismissed.

A. N. A. *Appeal No. 66 allowed.*

(2) 61 Ind. Cas. 945; 8 O. L. J. 124.
(3) 83 Ind. Cas. 51; 1 O. W. N. 515; 10 O. & A. L. R. 135; 11 O. L. J. 750; L. R. 6 A. (O.) 6; A. I. R. 1925 Oudh 262; 28 O. C. 119.

OUDH CHIEF COURT.

SECOND EXECUTION OF DECREE APPEAL No. 34 OF 1926.

November 17, 1926.

Present :—Mr. Justice Hasan.

Lala NAROTAM DASS—DECREE HOLDER—APPELLANT

versus

Lala NARAIN DAS—JUDGMENT-DEBTOR—RESPONDENT.

Oudh Rent Act (XXII of 1886), s. 145—Execution of rent-decree—Limitation—Amendment of decree,

effect of—Period of limitation, whether runs from date of amendment or of original decree.

Under s. 145 of the Oudh Rent Act, where a decree has been amended the period of limitation for the execution of the decree runs from the date of the amendment of the decree, and not from the date of the original decree.

Ashfaq Husain v. *Gauri Sahai* (1), relied on.

Second execution of decree appeal against an order passed by the District Judge, Fyzabad, in Rent Appeal No. 6 of 1926, dated the 24th February, 1926, reversing that of the Deputy Collector, Sultanpur, dated the 7th November, 1926.

Mr. *S. N. Roy*, for the Appellant.

Mr. *G. N. Mukherji* for Mr. *P. L. Verma*, for the Respondent.

JUDGMENT.—This is the decree-holder's appeal from the order of the District Judge of Fyzabad, dated the 24th of February, 1926, reversing the order of an Assistant Collector of Sultanpur, dated the 7th of November, 1925. The facts are these. On the 31st of January, 1922, the appellant obtained a decree for arrears of rent against respondent for a sum of Rs. 58-9-8 from the Court of an Assistant Collector of Sultanpur. Subsequently on an application made by the decree-holder the decree of the 31st of January, 1922, was amended under an order of the 22nd of March, 1922. On the 17th of July, 1924, an application for execution of the decree was made but proved infructuous. Second application for execution was made on the 16th of March, 1925, and that was the application out of which the present appeal has arisen.

The judgment-debtor objected to the execution on the ground that it was barred by three years' rule of limitation as provided by s. 145 of the Oudh Rent Act, 1886.

The Court of first instance rejected the objection and allowed the execution to proceed. On appeal by the judgment-debtor the learned District Judge of Fyzabad has reversed the order of the Court of first instance and rejected the application for execution as barred by limitation.

I am of opinion that the order of the Court of first instance was correct and should not have been interfered with. Section 145 of the Oudh Rent Act, 1886, is as follows :—

"A process of execution shall not be issued on a decree under this Act when the application for the issue of the process is made after the lapse of three years from the date of the decree, unless the decree is for a sum exceeding five hundred rupees, in which case.. ....."

The learned Judge of the Court below thinks that the process of execution now applied for must be taken to be on the decree as originally passed on the 31st of January, 1922, and not on the decree as amended on the 22nd of March, 1922. In this view of the learned Judge I am unable to concur. The right to execute the decree as it finally came to be amended only accrued when the amendment was made and it is the amended decree in relation to which the process of execution is applied for. Applying the language used by their Lordships of the Privy Council in the case of *Ashfaq Husain* v. *Gauri Sahai* (1) the order of the 22nd of March, 1922, "supplemented and completed the decree granted on the 31th of January, 1922, and for the first time gave to the plaintiff that which would alone justify him in applying for the joint execution to which he was entitled. It is from date of this last judgment (the 22nd of March, 1922).....that the time under the Statute began to run. It was then for the first time that the Court granted a complete decree to the respondent. It follows, therefore, that the plaintiff's remedy is not Statute barred."

I, therefore, allow this appeal, set aside the order of the lower Appellate Court and restore the order of the Court of first instance with costs throughout.

A. N. A. *Appeal allowed.*

(1) 9 Ind. Cas. 975; 33 A. 264; 15 C. W. N. 370; 8 A. L. J. 332; 13 C. L. J. 351; 9 M. L. T. 380; 13 Bom. L. R. 367; 4 Bur. L. T. 121; 21 M. L. J. 1140; 38 I. A. 37; (1911) 2 M. W. N. 177 (P. C.).

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2524 OF 1923.

February 5, 1926.

Present:—Mr Justice Suhrawardy.
and Mr. Justice Mukerji.

DEBENDRA NATH MITRA MAJUMDAR—APPELLANT

versus

Sheik SEFATULLA—RESPONDENT.

Muhammadan Law—Wakf—Mosque—Worshippers' right to maintain suit on behalf of mosque, principles relating to—De facto mutwalli, *right to sue—Limitation Act (IX of 1908), Sch. I, Art. 120—Suit to recover office of* mutwalli—*Adverse possession of office for more than six years, effect of.*

The true rule for deciding whether a person interested in a public mosque, simply as a person who has a right to worship therein can institute a suit in

connection with the mosque, is to determine in each particular case whether the plaintiff has or has not a cause of action which would entitle him to the relief which he claims. The question whether such a suit is maintainable at the instance of a particular plaintiff depends not upon any inherent right one may have to worship in a mosque but upon whether an individual right of the plaintiff has been violated or if any injury to that right is threatened. [p. 210, col. 1.]

Where the plaintiff sued as a *mutwalli* for declaration that certain properties belonged to the mosque and for recovery of possession of the same from a person to whom they were wrongfully alienated:

Held, that he cannot, if his right to *mutwallishipp* is found against, maintain his suit as framed in his capacity as a Muhammadan entitled to worship in the mosque. [*ibid.*]

[Case-law reviewed.]

The mere fact that a man professed to act as a *mutwalli* does not entitle him to sue for recovery of possession of *wakf* properties from a person in wrongful possession of them. [p, 210, col. 2.]

Piran v. *Abdool Karim* (13) and *Kazi Hassan* v. *Sagun Balkrishna* (14), distinguished.

A suit to oust a trespasser from the office of a *mutwalli* which is not hereditary is governed by Art. 120 of Sch. I of the Limitation Act and if no suit is brought to oust him within six years, he would acquire a complete title for purposes of litigation or anything connected with the endowment. [p. 210, col. 2; p. 211, col. 1]

The right to the possession of properties of a *wakf* is a right appurtenant to the office of the *mutwalli*. [p. 211, col. 1.]

Appeal against a decree of the Subordinate Judge, Burdwan, dated the 6th August, 1923, affirming that of the Munsif, First Court, Burdwan, dated the 28th August, 1922.

Dr. *Jadu Nath Kanjilal* and Dr. *Bijan Kumar Mukherjee*, for the Appellant.

Moulvis *Nuruddin Ahmed* and *Nurul Haq Chowdhury*, for the Respondent.

JUDGMENT.

Mukerji, J.—The plaintiff obtained in the Court of first instance a decree declaring his title as *mutwalli* to the lands in suit and entitling him to recover possession thereof from the defendant. That decree has been affirmed on appeal by the lower Appellate Court and the defendant has preferred this second appeal.

The history to the *wakf* to which the suit relates is important. One Khairatali in 1234 made a *wakf* in respect of a third share of his properties, and gave the remaining two-thirds share to his two grandsons Dadaliand Mohamedali in equal shares. The grandsons partitioned the properties between themselves, and the property now in suit fell to the share of Dadali. The latter by a deed dated 1262 made a *wakf* in respect of his properties and appointed his two wives Akbarannesa and Nujamannesa as *mutwallis*. The two wives acted as *mutwallis* till the death of one of them, *viz.*, of Akbarannesa, when the other, *viz.*, Nujamannesa became the sole *mutwalli*. She, in 1298 and before her death, appointed one Kudrutulla the father of the present plaintiff as *mutwalli* of the *wakf* estate. Kudrutulla managed the *wakf* till his death in 1312. The plaintiff's case is that he was appointed *mutwalli* by his father and he was acting as *mutwalli* since his father's death, when a dispute arose between him and his brother Nur Mohamed which eventually ended in a compromise by which some of the *wakf* properties were taken by one brother and some by the other and they both managed the *wakf* estate as such. In 1320 Nur Mohamed died and thereafter the plaintiff again became the sole *mutwalli*. The defendant had purchased the property in suit from Nur Mohamed and the plaintiff's case is that the sale was void as not having been made for legal necessity. The two main prayers in the plaint were as follows:—

(*Ka*) that it be declared that the properties in the schedule appertain to the *wakf* of Khairatali and Dadali; and (*Kha*) that the plaintiff be awarded a decree for possession it being declared that the defendant has acquired no title by his purchase. The other prayers were for subsidiary reliefs.

The suit as I have stated, has been decreed by the Courts below in the form stated above.

The findings which cannot be disputed and indeed have not been disputed at the present stage are that the *wakf* was a valid one, that the property is *wakf* property and that there was no legal necessity for the sale.

The ground upon which the validity of the decree has been challenged is that the plaintiff has not proved his title as *mutwalli*, and, therefore, is not entitled to the decree.

The Court of Appeal below has rested its decree upon the ground that the plaintiff was the *de facto mutwalli* of the *wakf* properties since the death of Kudrutulla, that the plaintiff also acted as *mutwalli* during the period that the management was in the hands of Nur Mohamed and that after Nur Mohamed's death Nur Mohamed's heirs allowed a decree to be passed in plaintiff's favour declaring his right to the *mutwallishipp*.

The learned Vakil for the respondent has sought to justify the decree upon a further ground, *viz.*, that as a Muhammadan his

client can maintain a suit like the present one.

It will be convenient to deal with the second ground first. A very interesting discussion of the question involved in this contention will be found in Mr. Ameer Ali's Muhammadan Law, Vol. I, Chap. XIX headed Rules of Procedure. So far as this Court is concerned it was held in effect in the case of *Jan Ali* v. *Ram Nath* (1) that the mosques, etc., to which the provisions of Act XX of 1863 apply are not any mosques, etc., but any mosques, etc., for the support of which endowments have been made by the Government or private individuals. In that suit two of the worshippers at a certain mosque instituted a suit after having obtained the sanction of the Advocate-General under s. 539 of the C. P. C. of 1882 against the *mutwalli* of the mosque and two other persons to whom the *mutwalli* had mortgaged part of the endowed property, and one of the mortgagees had sold some of the *wakf* property in execution of a decree which he had obtained upon his mortgage and the property had been purchased by the other mortgagee. The plaintiffs in the suit prayed that the property purchased might be declared *wakf*, that the sale in execution might be declared to be invalid, that a *mutwalli* might be appointed by the Court and that the costs of doing the acts of the *wakf* might be defrayed from the profits of the property belonging to the endowment. It was held by this Court that so far as regards such portion of the prayer as fell within the provisions of s. 539 of the Code the plaintiffs were not entitled to sue as they were not "persons having a direct interest in the trust,"—that being the language of the section as it stood at the time—within the meaning of the section, and that the suit should have been instituted under s. 14 of Act XX of 1863 after sanction had been obtained under s. 18; and as regards the relief asked for in the other prayers the plaintiffs might possibly have obtained leave to sue under s. 30 of the Code on behalf of themselves and other persons attending the mosque and they not having obtained such leave, the suit was not maintainable for those other prayers. It will be observed that in that case the interest which the plaintiffs alleged they had in the endowment was an interest based on their being followers of the Moslem religion, living in the vicinity of the mosque and being in the habit of attending the *musjid* (See the report at page 41*) In the case of *Lutifunnissa Bibi* v. *Nazirun Bibi* (2) the plaintiff sued to recover possession as *mutwalli* of certain lands alleging that they had been dedicated as *wakf* for certain charitable and religious purposes. She based her right to sue upon the fact that her deceased husband had been *mutwalli* and she prayed that the property in suit might be declared *wakf* and that certain alienations made by her step-son since her husband's death might be set aside. It was held in that case that even assuming that the endowment alleged was neither a public charity within the meaning of s. 539 of the C. P. C. nor a religious endowment to which Act XX of 1863 applied, the plaintiff was not entitled to sue alone as it was clear upon the face of the plaint that others were interested in the subject-matter of the suit and, therefore, she could only sue on behalf of all who were so interested having first obtained the leave of the Court and having otherwise complied with the provisions of s. 30 of the Code. A dissentient note was struck in the case of *Mohiuddin* v. *Sayiduddin* (3) in which case the plaintiff charged a *mutwalli* and *sajadanashin* with various breaches of trust and for the removal of the *mutwalli* and the manager appointed by the *mutwalli*, and for the appointment of one of the plaintiffs as *mutwalli* and for the framing of a scheme. It was a suit instituted with the consent of the Advocate General. In that case the learned Judges observed thus: "Nor do we think that the present suit is bad on the ground that the provisions of s. 30 of the C. P. C. have not been complied with. Since the judgment in the case of *Jan Ali* v. *Ram Nath* (1) there has been a material alteration effected in the section, and we think that the reasoning in the Allahabad cases, *Zafaryab Ali* v. *Bakhtawar Singh* (4) and *Jawahra* v. *Akbar Husain* (5), showing that the right of worship of each worshipper in a Muhammadan mosque or religious endowment is an independent right wholly irrespective of the right of the other worshippers, is correct." In a recent decision

(1) 8 C. 32; 9 C. L. R. 433; 4 Ind. Dec. (N. S.) 21.

(2) 11 C. 33; 5 Ind. Dec. (N. S.) 779.

(3) 20 C. 810; 10 Ind. Dec. (N. S.) 545.

(4) 5 A. 497; A. W. N. (1883) 91; 3 Ind. Dec. (N. S.) 432.

(5) 7 A. 178; A. W. N. (1884) 324; 4 Ind. Dec. (N. S.) 390 (F. B.).

*Page of 8 C.—[*Ed.*]

of this Court in the case of *Ashraf Ali* v. *Mahammad Nurajjama* (6) which was a suit instituted in accordance with the provisions of O. I, r. 8 of the C. P. C. by two worshippers of a mosque for themselves and as representing other worshippers in the locality for a declaration that a permanent lease granted by the *mutwalli* was void and inoperative it was held that such a suit was maintainable. In that case Shamsul Huda, J., (N. Chatterjea, J , concurring) after referring to certain authorities observed thus :— "It is clear from these texts that the worshippers living in the vicinity of a mosque have rights to it over and above those possessed by the Muhammadan public and have a more direct interest in its maintenance and in the proper administration of the properties endowed for its benefit. In Muhammadan Law there is definite recognition in many matters of what is termed *haqq-ul-jiran* or the rights of neighbours. The competency of a Muhammadan worshipper to enforce his individual rights in respect of a mosque and the trusts relating thereto has been recognized in numerous cases and I need only refer to the decision of Karamat Hossain and Chamier, JJ., in *Dasondhay* v. *Mohammad Abu Nasar* (7)." These observations, though made in a case in which the suit had been instituted under the provisions of O. I, r. 8 of the C. P. C., in so far as they refer to the individual rights of a Muhammadan worshipper in a mosque appear to be in conflict with the view expressed by the learned Judges in the case of *Jan Ali* v. *Ram Nath* (1). In the case of *Zafaryab Ali* v. *Bakhtawar Singh* (4) it was held in effect that a suit to set aside a mortgage of endowed property belonging to a mosque, the decree enforcing the mortgage, and sale of the mortgaged property—a *takia* known by the name of Najuf Ali Shah—in execution of that decree and for the demolition of buildings erected by the purchaser was maintainable by Muhammadans entitled to frequent the mosque and to use the other religious buildings connected with the endowment. In the case of *Jawahra* v. *Akbar Husain* (5) a Full Bench of the Allahabad High Court laid down that every Muhammadan who has a right to use a mosque for the purpose of devotion is entitled to exercise such right without hindrance and is competent to maintain a suit against any one who interferes with its exercise, irrespective of the provisions of ss. 30 and 539 of the C. P. C. The plaint in that case alleged that there was an old delapidated mosque intended for Muhammadan worship which was protected and looked after by the plaintiff and other Muhammadans of the village, that the mosque and its appurtenances had been excluded from the partition of the village being *wakf* property, that the plaintiff wanted to repair the mosque, but the defendants made certain structures on the land appurtenant thereto, committed acts of trespass in connection therewith and would not pay any heed to the plaintiff's remonstrance. Upon these allegations the plaintiff prayed for a declaration of his right to repair the mosque by removal of the defendants' interference and the demolition of the compound and removal of the mill, the thatches and the straw stored in the mosque. Petharam, C. J., in his judgment observed that a mosque is not the subject of human ownership but all the members of the Muhammadan community are entitled to use it for the purposes of devotion whenever it was open, that the right which they had in this respect is not a joint right but a right which belongs to many people, and s. 30 did not apply to such a case but would apply to a case in which many persons are jointly interested in obtaining relief. He held that the suit by the plaintiff was maintainable as it was clear that the individual right of the plaintiff was violated. Mahmud, J., in the same case remarked : "That section (meaning s. 30) applies only to cases where no individual right is interfered with; but here we have the case of a mosque in a small village, and one of the worshippers in that mosque is obstructed in his use of it for the purposes of devotion. He had a private right, and it was violated." The learned Judge dissented from the remarks made in the case of *Jan Ali* v. *Ram Nath* (1) holding that it is an undoubted principle of Muhammadan Law that the persons who have the most direct interest in a mosque are the worshippers who are entitled and accustomed to use it. In the case of *Wajid Ali Shah* v. *Dianat Ullah Beg* (8) a Muhammadan had brought a suit against a person in possession of certain property for a declaration that the property was *wakf*, but did not allege himself to be interested in

(6) 49 Ind. Cas. 355; 23 C. W. N. 115.
(7) 11 Ind. Cas. 36; 33 A. 660; 8 A. L. J. 710.
(8) 8 A. 31; A. W. N. (1885) 318; 4 Ind. Dec. (N. S.) 1042.

the property further or otherwise than as being a Muhammadan and he was not a Muhammadan resident of the district in which the *wakf* was situate. It was a suit under s. 42 of the Specific Relief Act. The reasons upon which the suit was held not maintainable were that the plaintiff had no legal character which was denied by any one, as he only asserted his character as a Muhammadan which was not questioned by any body, and he did not for himself assert right as to any property, and by no act of the defendant had his right to any property been denied. In the case of *Muhammad Alam* v. *Akbar Husain* (9) a suit for declaration was brought by seven Muhammadan residents of the city of Kanauj for a declaration that an *idgah* and the lands adjoining it which were situate in a village in *Pargana* Kanauj was *wakf* property, and it was held on a review of the earlier decisions of the Court and relying upon Mr. Ameer Ali's work on Muhammadan Law, Vol. I, Chap. XIX that as Muhammadans who had a right to use the *idgah* they were entitled to sue. In *Dasondhay* v. *Mohammad Abu Nasar* (7) which was followed in this Court in the case of *Ashraf Ali* v. *Muhammad Nurajjama* (6), to which I have already referred, two Muhammadans in whose hands lay the superintendence of certain *wakf* properties had sued for a declaration that a plot of land appertained to the *wakf* and for recovery of possession thereof on setting aside its alienation by those who were in charge thereof. It was held in the case that the plaintiffs were entitled to maintain the suit for a declaration that the alienation was void as the land was *wakf*, but not for a declaration for recovery of possession. In a later decision of ths same Court in the case of *Ram Chandar* v. *Ali Muhammad* (10) the principle was re-affirmed that every Muhammadan who has a right to use a mosque for purposes of devotion is entitled to exercise such right without interference and is competent to maintain a suit against any one who interferes with its exercise, but if he brings a suit in his personal capacity and not on behalf of the whole Muhammadan community that decision will be binding only as between the plaintiff and the defendant and cannot be taken advantage of by, and be binding on, the Muhammadan community in general. This was a case in which the mosque where worship was performed was attempted to be taken possession of by some Hindus in execution of a decree on a mortgage. In the case of *Muhammad Fahimul Huq* v. *Jagat Ballav Ghosh* (11) it was held that every Mussalman who derives any benefit from a *wakf* is entitled to maintain an action against the *mutwalli* to establish his right thereto or against a trespasser to recover any portion of the *wakf* property which has been misappropriated without joining any other person who may participate in the benefit, and that the plaintiff who in that case was a member of the family of a charitable *wakf*, being a beneficiary under the *wakf*, could sue for recovery of possession of property wrongfully alienated and for the incidental declaration that the property being *wakf* property could not be alienated and that where consequential relief was available to him he was not entitled to a mere declaration.

A similar contention appears to have been put forward in the case of a Hindu temple in a suit under s. 92 of the C. P. C. in the case of *Ramachandra Aiyyar* v. *Parameswaran Minbu* (12) the contention being to the effect that every Hindu has an interest within the meaning of the section, in every Hindu temple throughout the length and breadth of India, but it was held by a majority of the learned Judges that the definition of 'interest' in s. 15 of the Religious Endowments Act (XX of 1863) cannot be used as a guide in interpreting the word as used in s. 92 of the Code and that 'interest' under s. 92 of the Code denotes an interest which is substantial and not sentimental or remote and it must be a present and substantial and not a remote and fictitious or purely illusory interest. In that case of the two plaintiffs who instituted the suit with the consent of the Advocate-General in the District Court of North Malabar in respect of a Hindu temple situated in Tellichery in that District, one of them being a Hindu residing in Madras and the other in Tellichery, it was found that the former had gone to worship in the temple on one or two occasions in the past and might go there to worship in future if business took him to Tellichery ;

(9) 6 Ind. Cas. 835; 32 A. 631; 7 A. L. J. 797.
(10) 18 Ind. Cas. 797; 35 A. 197; 11 A. L. J. 233.
(11) 74 Ind. Cas. 403; 2 Pat. 391; A. I. R. 1923 Pat. 475; 4 P. L. T. 675.
(12) 50 Ind. Cas. 693; 42 M. 360; 36 M. L. J. 396; 25 M. L. T. 304; 9 L. W. 492; (1919) M. W. N. 370.

it was held that he had no interest within the meaning of s. 92 to maintain the suit.

In the present case no such considerations arise as would arise under s. 92 of the C. P. C. or under ss. 14 and 18 of the Religious Endowments Act, and the simple question which arises upon this contention of the respondent is whether a person interested in a public mosque simply as a person who has a right to worship therein, can institute a suit of this nature in his individual capacity.

In such cases the true rule, in my opinion, is to determine in each particular case as to whether the plaintiff has or has not a cause of action which would entitle him to the relief which he claims. The question as to whether the suit will be maintainable at the instance of a particular plaintiff depends not upon any inherent right which one may have to worship in a mosque or a temple upon the fact of his living in the vicinity or his being a mere resident of the District. I should venture to think that every Muhammadan has a right apart from his right as member of the community to worship in a public mosque and every Hindu has a right to worship in a public temple but on that does not depend his right to maintain any and every suit in connection with a religious endowment. It is not a question of any inherent right at all. If there is an individual right in the plaintiff which has been violated or if some injury to that right is threatened, the suit will lie. In each case this question will have to be determined upon the allegations made; and the nature of the relief that the plaintiff will be awarded will be consonant with infringement that has been caused or the injury that has been threatened. The plaint in the present case does not disclose any such infringement or injury, actual or threatened, nor is there to be found any complaint therein on the ground of the plaintiff's right as a worshipper in the mosque—assuming that he does worship in the mosque though he ordinarily resides in Calcutta—having been or is likely to be interfered with. He claims the relief in his character as *mutwalli* of the *wakf* properties and not in his character as a Muhammadan who uses the mosque or participates in the benefits of the endowment. In my opinion the plaintiff in the present case is not entitled to maintain the suit as framed accept in his character as *mutwalli* in respect of the *wakf*. In any event it is quite clear that the decree which has been passed in the suit, namely, a decree declaring his right as *mutwalli* to the land in suit and entitling him to recover possession thereof is not a decree which he could obtain on the footing of his being a Muhammadan only.

To turn now to the ground upon which the learned Judge has held the suit as maintainable. The learned Judge has given the plaintiff a decree on the footing not of his being a validly appointed *mutwalli* but on the ground that he is the *de facto mutwalli*. So far as this matter is concerned, in the first place, a very high ground has been taken on behalf of the respondent. It has been contended that if a man professes to act as *mutwalli* he is entitled to institute a suit for recovering possession of *wakf* properties from one who may have wrongfully acquired possession of it. In support of this proposition reliance has been placed upon the decision in the case of *Piran* v. *Abdool Karim* (13) and *Kazi Hassan* v. *Sagun Balkrishna* (14). In the first of these cases it was held that the plaintiff in the case who was in charge of the *dargah* and was discharging the duties connected with the institution had been elected to the office of *sajjadanashin* by a large number of Muhammadans residing in the locality and that appointment was held to have been a valid one and so the plaintiff had title to maintain the suit. In the second case it was found that the plaintiffs were not merely beneficiaries but members of the family of the *mutwallis* on whom the office of *mutwalli* would fall by descent if indeed it had not already fallen on them, as alleged in the plaint by abandonment and resignation of the *mutwallis* who were charged with having illegally made the alienations. These cases, therefore, are no authority for the proposition in the form in which it has been put before us. It was next urged on behalf of the respondent that the plaintiff was entitled to maintain the action having acquired a right by prescription to his office as *mutwalli* having acted adversely to all possible claimants for over the statutory period. The office of *mutwalli* not being a hereditary one, a suit to oust the plaintiff from his office as *mutwalli* is regulated by Art. 120 of the Schedule to the Limitation Act

(13) 19 C. 203; 9 Ind. Dec. (N. S.) 581.
(14) 24 B. 170; 1 Bom. L. R. 649; 12 Ind. Dec. (N. S.) 651.

and if no suit has been brought to oust the plaintiff, by reason of his having held the office for over six years he would acquire an indefeasible right to hold the office of *mutwalli* and would acquire a complete title for the purposes of litigation or anything connected with the endowment. *Jagan Nath Das* v. *Birbhadra Das* (15), *Kidambi Ragava Chariar* v. *Tirumalai Asari Nallur Raghavachariar* (16), *Salimulla* v. *Abdul Khayer Mohammad Mustafa* (17) and *Kassim Hassan* v. *Hazra Begum* (18). That the right of the plaintiff to hold the properties of the *wakf* is a right appurtenant to his office as *mutwalli* cannot be disputed: *Gnanasambandha Pandara Sannadhi* v. *Velu Pandaram* (19).

The question, therefore, is whether the plaintiff has held the office of *mutwalli* adversely to the rest of the world that is to say to all possible claimants in respect of the *wakf* and for the statutory period of six years. There is no express finding of the learned Subordinate Judge on this question. He has, no doubt, in agreement with the trial Court found that although the management of the properties was in the hands of Nur Mohamed the plaintiff was *de facto mutwalli* but this finding does not go far enough. Moreover, the legal effect and bearing of the matters upon which he has relied for this finding expressed in so general terms, do not appear to us to have been correctly appreciated, *e. g.*, the declaration of the plaintiff's right in a suit between him and the heirs of Nur Mohamed on consent by the said heirs not being a judgment *in rem* has been erroneously regarded as evidence as against the defendants, the declaration contained in the *nadabi ekrar* (Ex. A.) as to the rights of the plaintiffs, if any, in the properties which were given to Nur Mohamed does not appear to have been duly considered and the facts bearing upon the document executed by the plaintiff in favour of Eshaque in 1314 do not appear to have been sufficiently investigated. On the whole we are of opinion that the appeal has not been properly dealt with by the learned Subordinate Judge, and we accordingly set aside the decree passed by him and direct that the whole appeal be reheard except as to the question of the validity of the *wakf*, the question whether the property in suit is *wakf* property or not and the question of legal necessity, the findings on these matters being taken as in plaintiff's favour. After proper findings are arrived at on all the other questions which arise in the case, the appeal will be disposed of by the lower Appellate Court, and costs of this Court will abide the result.

In view of the fact that this case as well as the case out of which Appeal No. 2152 of 1923 has arisen both relate to the same *wakf* and in the latter case also a similar order of remand has been passed, we direct that both the cases if possible should be dealt with by one and the same Court but separately and each upon its own merits.

Suhrawardy, J.—I agree.

A. N. A. *Case remanded.*

(15) 19 C. 776; 9 Ind. Dec. (N. S.) 960.
(16) 26 M. 113.
(17) 3 Ind. Cas. 419; 37 C. 263; 11 C. L. J. 304; 14 C. W. N. 497.
(18) 60 Ind. Cas. 165; 32 C. L. J. 151.
(19) 27 I. A. 69; 23 M. 271; 4 C. W. N. 329; 2 Bom. L. R. 597; 10 M. L. J. 29; 7 Sar. P. C. J. 671; 8 Ind. Dec. (N. S.) 591 (P. C.).

OUDH CHIEF COURT.

SECOND CIVIL APPEAL No. 312 OF 1925.

September 14, 1926.

Present:—Mr. Justice Misra.

BABU LAL—DEFENDANT—APPELLANT

versus

Musammat SUKHRANI—PLAINTIFF AND BACHCHA AND ANOTHER—DEFENDANTS—RESPONDENTS.

Execution of decree—Legal representative of judgment-debtor not impleaded—Sale, validity of—Res judicata—*Issue decided during trial, whether can be re-agitated in execution.*

The representatives of a judgment-debtor are bound by attachment and sale held in execution of a decree although they may not have been formally made parties to the execution proceedings or other persons might have been made parties by mistake. [p. 213, col. 1.]

Malkarjun v. *Narhari* (1), relied on.

An issue which was raised and decided at the trial of a case before the passing of the decree, cannot be re-agitated in proceedings relating to the execution of the decree. [*ibid.*]

Appeal against a decree of the Subordinate Judge, Partabgarh, dated the 28th April, 1925, affirming that of the Munsif, Partabgarh, dated the 28th February, 1925.

Mr. *Surendro Nath Srivastava* for Mr. *Radha Kishen Srivastava*, for the Appellant.

Mr. *A. P. Nigam*, for the Respondent.

JUDGMENT.—This is a defendant's appeal in a declaratory suit. The plaintiff-respondent, *Musammat* Sukhrani, brought a suit in the Court of the Munsif of Partabgarh for a declaration that one-third of a certain house in Nawabganj, hamlet of village Ranjitpur Chilbila, District Partabgarh (No. 1250) had been illegally attached and sold in execution of a decree passed by the same Court and purchased by defendant No. 1, Babu Lal, who is the appellant before this Court.

The main allegations upon which the plaintiff's suit rested were that there were three brothers, named, Mitthoo, Bachcha and Madho who were all sons of one Janki deceased, that the house in suit was the joint property of all these three brothers, that before the attachment and sale a separation had taken place between the three brothers and the decree being only against Bachcha and Madho, the share of Mitthoo, which after his death had passed to his son Dubre and which after the latter's death had again been inherited by the plaintiff as his mother, could not be attached and sold and that, therefore, the plaintiff was entitled to the relief claimed. The learned Munsif, who tried the suit, came to a finding that the plaintiff's allegation as to separation had been established on evidence and on that finding gave the plaintiff a decree which she had claimed.

The defendant, Babu Lal, carried the matter further in appeal and the learned Subordinate Judge of Partabgarh dismissed the appeal agreeing with the finding of the learned Munsif.

The defendant, Babu Lal, has now appealed to this Court and the main point argued on his behalf in this Court was that the decree in execution of which the property had been attached and sold was a decree that had been passed against Dubre son of Mitthoo, and his two brothers, Bachcha and Madho and that, therefore, the attachment and sale was binding on the plaintiff. It was clear from the copy of the judgment of that case—*vide* Ex. A4—that on the 16th August, 1911, a joint decree was passed in favour of the appellant Babu Lal against Dubre, Madho and Bachcha for Rs. 184-6 and costs. It was not, however, clear from the record whether in execution of that very decree the house in suit had been put up for sale and purchased by the appellant. In order to clear this matter, I allowed the appellant time to file certified copies of documents showing this. The case has been heard again and the appellant has now put in before this Court certified copies of two documents : (1) copy of his application for execution dated 27th May, 1912, and (2) warrant of sale held in execution of the same decree. By a separate order recorded by me on the 7th September, 1926, when the appeal came up a second time for hearing before me, I admitted these two documents in evidence under O. XLI, r. 27, because I considered that this evidence was necessary to enable me to pronounce my judgment in this case.

These documents have now been brought on the record. Reading them with Ex. A4, it is quite clear that the decree originally was passed against three persons, namely, Dubre son of Mitthoo, Bachcha and Madho, that that decree was put into execution subsequently after the death of Dubre and for purposes of execution Bachcha and Madho, the other two defendants, were brought on the record as his representatives. It is also clear from the warrant of sale that the sale was held in execution of that very decree. Plaintiff had admitted in her plaint that the property was purchased by the defendant-appellant in Execution Case No. 435 of 1922 and the warrant of sale relates to that same execution case. The conclusion, therefore, seems to me to be irresistible that the property was attached and sold in execution of a decree to which Dubre whose representative the plaintiff-respondent, *Musammat* Sukhrani now claims to be, was a party and that she cannot now escape the effect of the sale held in execution of that decree. I also find from judgment Ex. A4 that the suit in which the decree was passed was brought by the appellant on the basis of a bond that had been executed by Mitthoo Lal and in that case Bachcha and Madho who were defendants along with Dubre, pleaded that no decree should be passed against them as there had been a separation in the family. This plea formed the subject of issue No. 2 and the finding of the Court was to the effect that the defendants were living jointly and that a decree should be passed against them all as representatives of Mitthoo, the original executant of the bond. It, therefore, appears to me that after that issue was decided in the original case, the same issue could not be agitated again when that very decree was being put in execution. I am clearly of opinion that an

issue, which is raised by the parties and tried out between them in the suit before the decree is passed, cannot be re-agitated on the execution side. If the Judges of the trial Court and of the Court of first appeal had taken a little trouble as I have done to find out that the decree in execution of which the property had been attached and sold was the same decree in which this matter had been decided, their conclusions I am sure, would have been different from what they have now arrived at.

It was contended before me by the learned Pleader for the respondent that because on the execution side the plaintiff, who was the real representative of Dubre, had not been brought on the record as his representative, she was not bound by the attachment and sale. I regret I cannot accept that contention. It has often been held that the representatives of a judgment-debtor are bound by attachment and sale held in execution of a decree, although they may not have been formerly made as parties or that wrong persons may have been parties to the decree—*vide Malkarjun* v. *Narhari* (1). I, therefore, hold that the plaintiff is bound by the decree in execution of which the property has been attached and sold.

I, therefore, allow this appeal, set aside the decrees of the Courts below and dismiss the plaintiff's suit with costs in all the three Courts.

A N. A. *Appeal allowed.*

(1) 25 B. 337; 27 I. A. 216; 5 C. W. N. 10; 10 M. L. J. 363; 2 Bom. L. R. 927; 7 Sar. P. C. J. 739 (P. C.).

MADRAS HIGH COURT.
FULL BENCH.

ORIGINAL PETITION No. 212 OF 1924.

October 19, 1925.

Present:—Sir Victor Murray Coutts Trotter, KT., Chief Justice, Mr. Justice Krishnan and Mr. Justice Beasley.

In the matter of NATHA VENKATESA PERUMAL *alias* YELCHURI *Sri* RAMULU CHETTYA—PETITIONER.

Majority Act (IX of 1875), s. 3—Guardians and Wards Act (VIII of 1890), ss. 7 (iii), 34—Appointment of guardian conditional on furnishing security, validity of—Failure to furnish security, effect of—Age of majority, 18 or 21.

Where, under the Guardians and Wards Act a person appointed guardian of a minor on condition o his furnishing security fails to furnish the same there is no appointment of a guardian within the meaning of s. 3 of the Majority Act and the minor attains his majority on completing his 18th year and not his 21st year. [p. 214, col. 1.]

Such a conditional order of appointment is *ultra vires* and bad *in toto* inasmuch as the valid part of appointment of guardianship cannot be severed from the invalid part of demanding security. [p. 214, col. 2.]

The practice of issuing suspensory orders condemned and the proper procedure to be followed pointed out. [p. 214, col. 2; p. 215, col. 1.]

Goppammal v. *Srinivasa Aiyangar* (1), followed.

Subba Naick v. *Rama Aiyar* (2), overruled.

Case referred to a Full Bench, in O. P. No. 212 of 1924 on the file of the High Court by Srinivasa Iyengar, J.

Mr. *V. Radhakrishnayya*, for the Petitioner.

JUDGMENT.—This is a matter which has been put before a Bench on the suggestion of the learned trial Judge Srinivasa Iyengar, J., because it raises a question of some difficulty and some conflict of authorities. The facts are these. There was a minor called Natha Venkatesa Perumal Chetty. On the 20th November, 1924, an order was made by Waller, J., in Chambers conditionally appointing the natural father of the boy as his guardian under the Guardians and Wards Act. Part of the order was that the father was to furnish certain security. He did not do so and he died in the following July without having furnished any security at all in compliance with the condition contained in the order. On the 15th of August, 1925, the minor became 18 years old. The question we have to determine is whether, having regard to the events that happened and to the terms of the order of Waller, J., the minor is to be regarded as subject to the longer term of minority ending at 21 provided by the Indian Majority Act or is to be regarded as having in August attained his majority, when he completed his 18th year. We will first refer to the relevant statutory provisions. Section 3 of the Indian Majority Act (IX of 1875) runs as follows:—

"Every minor of whose person or property or both a guardian.....has been or shall be appointed or declared by any Court of Justice before the minor has attained the age of 18 years.....shall, notwithstanding anything contained in the Indian Succession Act (X of 1865) or in any other enactment, be deemed to have attained his majority when he shall have completed his age of twenty-one years, and not before."

The question, therefore, raised by that Act is whether there has been appointed or declared by a Court of Justice such a guardian in which case his majority automatically on the making of the order is prolonged to the age of 21. We, therefore, turn to the Guardians and Wards Act (VIII of 1890) to see what its provisions are with regard to the appointment of guardians. By s. 7 (1)

"Where the Court is satisfied that it is for the welfare of a minor that an order should be made—(*a*) appointing a guardian of his person or property, or both, or (*b*) declaring a person to be such a guardian, the Court may make an order accordingly."

Then finally by s. 34, it is provided as follows:—

"Where a guardian of the property of a ward has been appointed or declared by the Court.....he shall,—(*a*) if so required by the Court, give a bond as nearly as may be in the prescribed form, to the Judge of the Court to enure for the benefit of the Judge for the time being, with or without sureties, as may be prescribed, engaging duly to account for what he may receive in respect of the property of the ward;"

The short point here is this: Was the conditional order which was made in this case *intra vires* of the Statute under which the appointment is made. A suggestion is made that the only power given under s. 34 is to impose the duty of finding security and executing a bond on the person who is before the Court in the capacity of an appointed guardian. If that be so, there would be no power to impose such a condition upon a person who is merely an aspirant to the office of guardian before the Court actually appoints him. There are two different opinions in this Court on the subject; one is the opinion of Sadasiva Iyer, J., contained in *Goppammal* v. *Srinivasa Aiyangar* (1) in which he expressed the opinion that these suspensory conditions are not warranted by the words of the section, and that the Mufassal Rules, the Civil Rules of Practice, which appear, to validate them are thus *ultra vires* under the Act. In our opinion, that view is the correct one and the later opinion expressed by a Bench of this Court consisting of Ayling and Seshagiri Iyer, JJ., reported as *Subba Naick* v. *Rama Aiyar* (2) to the contrary is incorrect. If this be so, the sole question that arises is this: Was this order wholly bad or can we sever the valid from the invalid? On that it seems to us that, if the learned Judge had as it were definitely made an appointment but merely hampered it with a condition warranted by the Act, that would be one thing and this Court might be able to say that the part creating the guardian was positive and effectual and reject the rest demanding the security. That seems to have been the view adopted by Stephen, J., in *Gopal Chunder Bose* v. *Gonesh Chunder Srimani* (3). Apparently that view has not been accepted in later cases by other Judges in Calcutta. The matter, we think, turns upon the actual wording of the order; and that wording is this:—

"That upon Lakshminarasimhulu Chetty, the petitioner herein, furnishing security to the satisfaction of the Registrar of this Court for a sum of Rs. 5,000, only he be, and hereby is, appointed guardian of the property of the said minor during his minority or until the further order of this Court."

It seems to us impossible to say that the learned Judge who passed that order could have meant to do otherwise than make the actual appointment of the guardian coming into force, dependent upon a prior furnishing of the security. Therefore, if this order is bad, we think it is bad *in toto*. No practical difficulty will, as we conceive it, arise, as we think it can very easily be met by adopting a different form of procedure. The mischief of these suspensory orders, apart altogether from the question as to whether they are legal or invalid, is that the matter goes before the Judge who makes these suspensory orders and then the papers go into the office where it is nobody's business to see what is being done about it. The order is not complied with, and then somebody finds out that the minor, whom it was desired to protect, has attained his majority, and the Court is powerless because the guardian has failed to carry out its directions and the Court has kept no control over the matter by reason of the nature of the order so as to summon the guardian and ask him "why have you not furnished the security?" The remedy seems to us to be quite simple. Let the learned

(1) 34 Ind. Cas. 432; 30 M. L. J. 508.
(2) 37 Ind. Cas. 892; 40 M. 775; 5 L. W. 261; (1917) M. W. N. 426.

(3) 4 C. L. J. 112.

Judge, before he makes the appointment of a guardian, if he is satisfied that it is a proper case for the minor to have a guardian in charge of his property and of his affairs, make enquiries about the proposed guardian and satisfy himself fully whether, if appointed, he will be in a position and will be willing to execute a bond to the amount that the learned Judge thinks that the use and the value of the estate demand; and, if after that, he makes an order, which the guardian disobeys, as to the furnishing of security, then there are remedies against the guardian without the consequence of the minor being left in this position, with no valid order appointing a guardian made at all and his ceasing, or rather being never taken, to be a ward of the Court. It is only right to say that we gather that in this case there is no question of any dangerous consequences to the minor owing to this misfortune that happened, but there are cases readily conceivable, and probably within the experience of many, where young men in this city are surrounded by circumstances which would make it imperative for the Court in their own interests to provide them with guardians. We think, therefore, that there being a doubt as to the validity of suspensory orders, it will be well if the practice of this Court in future were not to make orders in this form, but to adopt the procedure which we have suggested.

We are, therefore, of opinion that this boy, Natha Venkatesa Perumal Chetty, is now a major.

V. N. V. *Reference answered.*

OUDH CHIEF COURT.

SECOND CIVIL APPEAL No. 552 OF 1925.

November 10, 1926.

Present:—Sir Louis Stuart, KT., Chief Judge, and Mr. Justice Hasan.

BRAMAHDIN AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

RAM LAKHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Guardian—Power to revive barred debt—Debt contracted by father—Son's pious obligation.

A Hindu mother as guardian of her minor sons is not competent to revive a barred debt contracted by their father by executing fresh bonds for the same.

Second appeal against a decree of the Subordinate Judge, Sultanpur, dated the 24th August, 1925, confirming that of the Munsif, Amethi at Sultanpur, dated the 25th September, 1924.

Mr. *Naim Ullah*, for the Appellants.

Mr. *Satya Nand Roy* for Mr. *Gokul Prosad*, for the Respondents.

JUDGMENT.—This is the plaintiffs' appeal from the decree of the Subordinate Judge of Sultanpur, dated the 24th of August, 1925, affirming the decree of the Munsif of Amethi, dated the 25th of September, 1924.

There were two plaintiffs in the suit, out of which this appeal arises, Barhmadin and Ram Lakhan. They represented the estate of one Sukhdeo deceased. The three minor defendants are the sons and the 4th defendant is the widow of one Mahadeo deceased. The widow is the guardian of the minor children.

On the 23rd of May, 1915, Mahadeo executed three bonds in favour of Sukhdeo for a total consideration of Rs. 284-4-9. After the death of Mahadeo, his widow *Musammat* Ram Raji, in the capacity of a guardian executed two bonds on the 5th of June, 1919 in consideration of the debt due under the previous three bonds. The suit is founded on the later two mentioned bonds for the recovery of the amount due under them.

The three old bonds are not forthcoming. The lower Appellate Court has found on evidence that they contained a promise of re-payment within one year of the date of execution. On the date of the bonds in suit, therefore, the recovery of the debt due under the previous bonds had become time-barred. The learned Subordinate Judge is of opinion that the guardian of the minors was not competent in law to revive the time-barred debt. His opinion is supported by a decision of the late Court of the Judicial Commissioner of Oudh in the case of *Gaya Prasad* v. *Maharaj Kuar* (1).

It is admitted that on the date of the execution of the bonds in suit the recovery of the debt due under the previous bonds had become time-barred as against the minors and had a suit for the recovery of that debt been brought on the date of the execution of the bonds in suit the plea of limitation could successfully have been raised by the minors. We do not think

(1) 7 O. C, 46.

that the mother of the minors was competent by her act of executing the new bonds to deprive the minors from the benefit of that plea. It may be that under the Hindu Law the sons of a deceased Hindu father are laid under an obligation to pay their father's debts but the law of the land also gives them the right to avail themselves of the rules of limitation. If, therefore, the enforcement of such an obligation is barred by limitation the obligation, *simpliciter*, is of no avail to the creditor.

The appeal fails and is dismissed with costs.

G. H. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1329 OF 1924.

May 17, 1926.

Present:—Mr. Justice B. B. Ghose and Mr. Justice Graham.

CHANDRA MOHAN BANIKYA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Srimati MEHERJAN BANU AND OTHERS—DEFENDANTS—RESPONDENTS.

*Bengal Tenancy Act (VIII of 1885), ss. 49, 182—Under-*raiyati *tenure including homestead lands—Tenant, liability of to be ejected from entire holding—Partial ejectment, when allowed.*

Where an under-*raiyat* holds homestead land along with other lands as part of his under-*raiyati* tenancy, if he is liable to be ejected from his holding by service of notice, there is nothing in law which prevents him from being ejected from the whole of the demised premises. Section 182 of the Bengal Tenancy Act is not applicable to such cases. [p. 217, col. 2.]

Where a particular tenancy falls within the provisions of s. 49 of the Bengal Tenancy Act s. 182 of the Act cannot be invoked to determine the status of the tenant. [p. 216, col. 2.]

Partial ejectment can be allowed only under special circumstances and a strong case must be made out for decreeing ejectment of a tenant from only a part of his holding. [p. 217, col. 1.]

Appeal against a decree of the District Judge, Noakhali, dated the 14th March, 1924, modifying that of the Munsif, Second Court, Lakhipur, dated the 19th December, 1923.

Babus *Jogesh Chunder Roy* and *Jatindra Nath Sanyal*, for the Appellants.

Babu *Mohendra Kumar Ghose*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiffs arising out of a suit for ejectment of the defendants from lands which are alleged to be held by them as under-*raiyats* under the plaintiffs. The suit was brought after service of notice to quit under s. 49 of the Bengal Tenancy Act. The lands consist of certain arable lands, a piece of land on which the defendants have got their homestead and certain *bhita* lands comprised within certain settlement *dags*. The trial Court passed a decree in favour of the plaintiffs. On appeal by the defendants, that decree has been modified by dismissing the plaintiffs' suit for *khas* possession of the *bhita* lands as well as the land on which the defendants' homestead stands. With regard to the arable lands the decree of the Munsif has been affirmed. The plaintiffs contend that this decision of the lower Appellate Court is erroneous and that they are entitled to *khas* possession of all the lands in question. The first thing that strikes us with regard to the decision of the District Judge is that he has made a decree for partial ejectment from the lands held by the under-*raiyats* under s. 49 of the Bengal Tenancy Act. The reason for his so doing is that s. 182 of the Bengal Tenancy Act applies to the *bhita* lands. The learned Judge has held that in the present case the homestead is not held by the defendants who are also *raiyats* of the village as a part of their *raiyati jote*, but is held as a part of the under-*raiyati* and, therefore, in his opinion, the tenants can claim the protection of s. 182 of the Bengal Tenancy Act and cannot be ejected from the said land on notice under s. 49, although they are under-*raiyats*, also in respect of the same. But the principal ground for not accepting the decision of the District Judge is that, when a particular tenancy falls within the provisions of s. 49 of the Bengal Tenancy Act, it is difficult to understand how s. 182 of the Act can be invoked in determining the status of the tenants. The learned Vakil for the respondents relies upon the case of *Krishna Kanta Ghosh* v. *Jadu Kasya* (1) in support of his contention that the defendants are protected under the provisions of s. 182 of the Bengal Tenancy Act. In that case, however, the position was that the defendants-tenants held the homestead land only under the plaintiff as their landlord and it was held that, as the home-

(1) 28 Ind. Cas. 839; 21 C. L. J. 475; 19 C. W. N. 914.

stead was not held by the tenants as part of their holding as *raiyats*, the incidents of the homestead were to be regulated under the provisions of s. 182 of the Bengal Tenancy Act. In the present case, the under-*raiyats* held the homestead along with other lands as part of their under-*raiyati* tenancy and, if the plaintiffs are entitled to eject them from the lands held by them by service of notice, there is nothing under the law which prevents them from ejecting the tenants from the whole of the demised premises. In our opinion, s. 182 of the Bengal Tenancy Act does not apply to the present case. We find that the same view was taken in the case of *Rahimuddi Meaji* v. *Srimati Amina Bibi* (2). Partial ejectment can be allowed only under special circumstances, and cannot be decreed as a rule. Either the landlord is entitled to eject the tenant or is not; some strong case must be made out for the purpose of holding that the landlord can eject a tenant from only a part of the tenancy. In our opinion, the landlords in this case are entitled to recover possession of the whole of the lands held by the defendants under them as under-*raiyats*.

The next contention advanced on behalf of the respondents is that the plaintiffs having an eight-anna share only with regard to certain lands are not entitled to *khas* possession. The point, however, was rightly decided against the defendants by the lower Appellate Court as the District Judge held that he did not see any reason why the plaintiffs would not be able to determine the tenancy under them if the tenancy was otherwise terminable. It also does not appear why the learned Judge held that the plaintiffs would not be entitled to *khas* possession or even joint possession with regard to the lands in which they had only an eight anna share. The plaintiffs let out only eight annas of these lands to the defendants and, if the tenancy is terminated, they are entitled to possession of the lands which they had let out. As in the present case it was found that the tenancy was terminated by proper service of notice to quit, the plaintiffs are entitled to recover possession of all the lands for which they brought the suit.

The result, therefore, is that the appeal is decreed. The decree of the District Judge is set aside and that of the Munsif is restored with costs in this Court and in the lower Appellate Court.

The cross-objection is not pressed and is dismissed without costs.

A. N. A. *Appeal allowed: Cross-objection dismissed.*

(2) 94 Ind. Cas. 920; 43 C. L. J. 132; A. I. R. 1926 Cal. 662.

OUDH CHIEF COURT.

RENT APPEAL No 82 OF 1925.

September 23, 1926.

Present :—Sir Louis Stuart, KT., Chief Judge, and Mr. Justice Raza.

FATEH NARAIN DAS—PLAINTIFF —APPELLANT

versus

ABDUL RAHMAN—DEFENDANT— —RESPONDENT.

Oudh Rent Act (XXII of 1886), s. 108 (15)—Lambardar—*Suit by co-sharer for profits—Failure to produce account books, whether imposes liability for profits not collected.*

The mere fact that a *lambardar* is unable to produce his account books is not a ground for making him liable for profits on the basis of demands rather than of realizations. [p. 218, col. 2.]

Second appeal against a decree of the Second Additional District Judge, Lucknow at Unao, dated the 7th September, 1925, reversing that of the Deputy Collector, Safipur, District Unao, dated the 11th December, 1924.

Mr. *Radha Krishna*, for the Appellant.

Mr. *Zahur Ahmad*, for the Respondent.

JUDGMENT.—Ths suit, out of which this appeal arises, was a suit brought by a co-sharer against the *lambardar* under the provisions of s. 108, cl. (15), Act XXII of 1886. The learned Deputy Collector awarded profits upon the basis of demands and not of realizations. The learned District Judge found on the facts, that there was no proof of negligence or misconduct on the part of the defendant *lambardar*, and passed a decree on the basis of collections. As on the basis of proved collections nothing was due to the plaintiff sharer, his suit was dismissed. In this second appeal the plaintiff-appellant seeks to obtain a restoration of the decree of the learned Deputy Collector. The appeal was admitted in view of the plea, that in certain decisions of the Judicial Commissioner's Court of Oudh it had been laid down as a proposition, that failure of a *lambardar* to produce private books of accounts was in itself

evidence of negligence, and inasmuch as the defendant *lambardar* here did not produce private books of account, this appeal was admitted on the point of law for decision, as to whether this omission in itself constituted negligence or misconduct. The first decision of the Judicial Commissioner's Court we have been able to find upon the point is the decision of a single Additional Judicial Commissioner in *Ubaid Ullah Khan* v. *Nazir Husain Khan* (1). The last portion of the headnote is to the following effect: "A *lambardar* failing to produce his account books is not entitled to claim a reduction in the gross rental. The onus of proving the actual collections lies on him." We do not find that the decision in question actually laid down that proposition. It appears to us to have laid down merely that a *lambardar* claiming expenses for collection should be compelled to prove what those expenses are. The second decision which we have found is one contained in *Raghunath Singh* v. *Har Dayal Singh* (2). This is also a single decision of an Additional Judicial Commissioner. This lays down nothing further than that in a particular case, in which the District Judge had found that the recorded collections were suspiciously low, and that the defendant *lambardar* had neither produced any accounts, nor given any evidence to show what he had collected, a finding of fact by the District Judge in appeal to the effect that the full demand must have been collected could not be disturbed in second appeal. The third and last decision which we have been able to find is *Suraj Prasad* v. *Debi Dayal* (3). This is also a decision of a single Additional Judicial Commissioner. The only bearing which it has on the matter in dispute was that it decided that where negligence on the part of a deceased *lambardar* was proved his heirs could be held responsible for that negligence to the extent of the assets which were in their hands. The learned Additional Judicial Commissioner laid down that the failure to collect more than a small fraction of the rents would give rise to a presumption of negligence which it was the duty of the *lambardar* to rebut. He did not affirm the principle that the mere failure to produce accounts afforded evidence of negligence, which must be accepted to prove negligence before a lower Appellate Court.

The Oudh Rent Act has no provision corresponding to the provisions in s. 164 in the Local Act II of 1901 (N. W. Tenancy Act) before its present revision. The portion of that section, with which we are concerned, is to the effect that a Rent Court might award to the sharer not only a share of the profits actually collected by the *lambardar* but also such sums as the sharer might prove to have remained uncollected owing to the negligence or misconduct of the *lambardar*. There has been a tendency in Oudh to read into the provisions of Act XXII of 1886 a similar provision, but the Court cannot proceed upon an assumption, that such a provision exists. It is certainly open to the Courts in awarding a share of the profits of an estate in favour of a sharer as against a *lambardar* to arrive at a conclusion upon the facts, that the *lambardar* has collected more than he admits that he has collected, and to give a share of profits based upon such a finding, but we are not of opinion that the law upon the subject can go to the extent of affirming that merely because a *lambardar* has been unable to produce accounts, he must, therefore, be held to be liable on the basis of demands rather than of realizations. Upon the finding that there is no proof of negligence and misconduct we dismiss this appeal with costs.

A. N. A. *Appeal dismissed.*

(1) 24 Ind. Cas. 15; 1 O. L. J. 184.
(2) 56 Ind. Cas. 751; 7 O. L. J. 278.
(3) 65 Ind. Cas. 739; 8 O. L. J. 485; 25 O. C. 49; A. I. R. 1922 Oudh 149.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 147 OF 1924.

March 12, 1926.

Present:—Mr. Justice Ramesam.

S. A. CHINNA MARACAYAR—PETITIONER

versus

AVVA NACHIAL AND OTHERS—RESPONDENTS.

Succession Certificate Act (VII of 1889), s. 4—Suit by one of several heirs of deceased creditor to recover debt due to deceased, maintainability of—Succession certificate, necessity of.

A suit by the heir of a deceased creditor to recover a debt due to the deceased is maintainable without a succession certificate but a decree ought not to be passed in such a suit without the production of a succession certificate.

Where one of several heirs of a deceased person obtains a succession certificate to collect the whole of a debt due to the deceased, he is entitled to obtain a decree in respect of the whole debt.

Petition, under s. 25 of Act IX of 1887, and s. 107 of the Government of India Act, praying the High Court to revise a decree of the Court of the Subordinate Judge, Negapatam, dated the 21st January, 1924, in S. C. S. No. 821 of 1923.

Mr. *W. S. Subrahmanya Iyer*, for the Petitioner.

Mr. *Subramania Iyer*, for the Respondent.

JUDGMENT.—This revision petition arises out of a suit by a Muhammadan widow to recover a sum of money said to have been borrowed by the 1st defendant from her husband Saiyed Abdul Khader who died in 1922. The loan was said to have been borrowed on or about the 1st August, 1920. At about that time the 1st defendant was carrying on business in the Straits Settlement and Siam, but, of course, he was coming to and going from India. The 2nd defendant is the mother and the 3rd and 4th defendants are the sons of the said Saiyed Abdul Khader. The Subordinate Judge has given a decree and the 1st defendant has filed this revision petition.

The first point argued by Mr. Subramania Iyer is that the lower Court erred in granting a decree without the production of a succession certificate. There is no doubt that the suit is maintainable without a succession certificate but a decree ought not to be given without the production of a succession certificate in such a case. In this case, the application for succession certificate was filed before the same Subordinate Judge (*vide* para. 7 of the lower Court's judgment) and I am also satisfied that the plaintiff has since filed security and succession certificate has been ordered to issue. I do not, therefore, think that there is anything in this point.

The next point is that the plaintiff being one of several heirs is not entitled to sue for the whole of the debt due to her husband. Strictly, this is correct, but the plaintiff says in his plaint that she sues on behalf of all the heirs and though it may be permissible to construe the plaint with the help of this statement that the plaintiff is practically acting as next friend of the minor defendants Nos. 3 and 4 in filing the suit, certainly no decree can be given for the share of the 2nd defendant who is not a minor. But in view of the fact that succession certificate has been obtained by the plaintiff authorising her to collect the whole of the debt, the point becomes unimportant. I think the plaintiff is entitled to obtain a decree for the whole amount having regard to the succession certificate and, therefore, it is unnecessary to pursue this point further.

The petition is dismissed with costs.

[The remaining portion of the judgment deals with the evidence in the case and is not material for the purposes of this report.—*Ed.*]

V. N. V.
Z. K.

Petition dismissed.

OUDH CHIEF COURT.

FIRST EXECUTION OF DECREE APPEAL No. 3 OF 1926.

August 27, 1926.

Present:—Sir Louis Stuart, KT., Chief Judge, and Mr. Justice Hasan.

Musammat FATIMA KHANAM AND ANOTHER—DECREE-HOLDERS—APPELLANTS

versus

Nawab RAZA ALI KHAN AND ANOTHER—OPPOSITE PARTY—RESPONDENTS.

C. P. C. (Act V of 1908), O. XXI, rr. 99, 102—Purchaser, pendente lite, discharging previous possessory mortgage—Right to obstruct delivery of possession to decree-holder—Subrogation, doctrine of.

Resistance to the execution of a decree by a purchaser *pendente lite* who has discharged a previous possessory mortgage and obtained possession from the mortgagee falls within the purview of O. XXI, r. 99 and not O. XXI, r. 102, inasmuch as he is entitled to stand in the shoes of the mortgagee who was paid off by him. [p. 220, col. 2; p. 221, col. 2.]

Appeal from an order of the Subordinate Judge, Lucknow, dated the 17th November, 1925.

Mr. *M. Wasim*, for the Appellants.

Messrs. *Abid Husain*, *Hyder Husain* and *Niamatullah*, for the Respondents.

JUDGMENT.—This is an appeal from the order of the Subordinate Judge of Lucknow, dated the 17th of November, 1925, and arises out of execution proceedings taken in relation to a decree passed by the Court of the Additional District and Subordinate Judge of Wardha in the Central Provinces on the 29th of November, 1921, and made absolute on the 31st of July, 1922, in

favour of the appellants for possession of a house situate in the city of Lucknow. The suit in which the aforementioned decree was passed was one for partition of joint family property. The decree was transferred to the Court of the Subordinate Judge of Lucknow for purposes of execution. In taking out execution and obtaining possession of the house in question the decree-holders were resisted by the first respondent, Raza Ali Khan, on behalf of second respondent, Sir Israr Husain Khan, who is a purchaser of the house in question. The result was that the decree-holder made an application under O. XXI, r. 97 of the C. P. C., complaining of the resistance offered by the respondents. The learned Subordinate Judge has dismissed the application of the decree-holders purporting to have done so under r. 99 of O. XXI of the Code by his order under appeal.

At the hearing of the appeal the learned Counsel for the respondents took a preliminary objection that no appeal was allowed by the Code from an order passed under r. 99; but the decision of this objection depends on the consideration of the merits of the whole case and we, therefore, at once proceed to it. The facts are as follows:—

The suit for partition, which resulted in the decree now under execution, was instituted on the 9th of September, 1918. One of the parties to the suit was Abdul Karim, a member of the family of the decree-holders. He was arrayed on the side of the defendants, and on the same side were the present appellants. The house in question was originally acquired under a deed of sale in the name of Ghulam Husain, who was also one of the members of the family. Ghulam Husain sold it to Abdul Karim on the 8th of May, 1911. On the 15th of March, 1915, Abdul Karim made a simple mortgage in respect of the house in question in favour of one *Musammat* Ahya Begam. On the 28th of September, 1916, Abdul Karim made another mortgage of the house in suit to one *Musammat* Saltanat Begam for a sum of Rs. 10,000. It is admitted that this was a possessory mortgage and possession passed to the mortgagee by virtue of it. Saltanat Begam discharged the simple mortgage of the 15th of March, 1915. On the 20th of November, 1918, Abdul Karim made a third mortgage, again possessory, of the house in dispute in favour of Sir Israr Husain Khan for a sum of Rs. 14,000. The mortgagee paid off the possessory mortgage of the 28th of September, 1916, and admittedly entered into the possession of the mortgaged house. The mortgage in favour of Sir Israr Husain Khan also gave him a remedy for sale of the mortgaged property for the purpose of realizing the mortgage money on certain conditions. Availing himself of this provision he brought a suit for sale and obtained a decree on the 1st of July, 1920. On the 19th of January, 1921, Abdul Karim sold the house in question to Sir Israr Husain Khan by a private sale for a sum of Rs. 20,000.

The case of the decree-holders is that the mortgage of the 20th of November, 1918, and the sale of the 1st of July, 1920, both made by Abdul Karim in favour of Sir Israr Husain Khan, were transfers *pendente lite* within the meaning of r. 102 of O. XXI of the C. P. C and, therefore, the case was not one to which the provisions of r. 99 could be applicable and, therefore, also Sir Israr Husain Khan was merely a representative of the judgment-debtor, Abdul Karim, within the meaning of s. 47 of the C. P. C. It is agreed that if r. 99 is applicable to the facts of this case then the order which the lower Court has passed is not appealable and can only be questioned by a suit as provided by r. 103 of O. XXI of the C. P. C.

The only question, therefore, for decision is as to whether r. 99 is applicable to the facts of this case or not. In agreement with the Court below we are of opinion that it is.

There can be no question, and indeed it has been admitted all along that the possessory mortgage of the 20th of November, 1918, and the sale of the 1st of July, 1920, both in favour of the respondent, Sir Israr Husain Khan, were transfers *pendente lite*, but the case of that respondent is that he is in possession of the house in question by reason of the fact that he initially obtained it from the prior mortgagee, *Musammat* Saltanat Begam, and there has been no discontinuance of it since. His contention is that he is entitled to be treated as a transferee of the mortgagee rights of *Musammat* Saltanat Begam, whose possessory mortgage he admittedly satisfied. According to our judgment the contention is right and must be upheld.

The equity of subrogation is entirely in favour of the respondent. One of us had to consider at some length the scope and

nature of such an equity in the case of *Bibi Jai Kishori* v. *Mohammad Ali Mohammad Khan* (1) decided in the late Court of the Judicial Commissioner of Oudh. It was said there:

"The general rule, therefore, is that 'one who advances money to pay off a charge becomes in equity a transferee of the charge and intends to keep it alive.'"

The principle of subrogation was recently enunciated also by their Lordships of the Privy Council in the case of *Malireddi Ayyareddi* v. *Adusumilli Gopala Krishnayyar* (2). In delivering the judgment of the Judicial Committee, Lord Phillimore said:—

"It is now settled law that where in India there are several mortgages on a property, the owner of the property subject to the mortgages may, if he pays off an earlier charge, treat himself as buying it and stand in the same position as his vendor, or, to put it in another way, he may keep the incumbrance alive for his benefit and thus come in before a later mortgagee."

Sir Israr Husain Khan must, therefore, be treated, in relation to his possession, as a purchaser from *Musammat* Saltanat Begam of the possessory mortgage of the 28th of September, 1916. There is a still more recent decision of the same tribunal in the case of *Ram Charan Lonia* v. *Bhagwan Das Maheshri* (3). In this case the purchasers of a certain joint family property under a contract made by the *karta* discharged the debt due under an earlier mortgage out of the sale price. There was no question of priority among several mortgages. On a suit by the *karta's* sons the contract of sale was set aside, but as regards the mortgage, which the purchasers had paid off, their Lordships of the Privy Council held that the purchasers stood in the shoes of the mortgagee and that the possession of the property by them, although unwarranted as purchasers, should be treated as possession under a usufructuary mortgage.

(1) 60 Ind. Cas. 560; 7 O. L. J. 620.

(2) 79 Ind. Cas. 592; 1 O. W. N. 27; 51 I. A. 140; 47 M. 190; 22 A. L. J. 45; 46 M. L. J. 164; A. I. R. 1924 P. C. 36; 19 L. W. 215; 26 Bom. L. R. 204; 34 M. L. T. 1; 2 Pat. L. R. 99; 10 O. & A. L. R. 269; (1924) M. W. N. 290; 39 C. L. J. 204; 28 C. W. N. 1025; L. R. 5 A. (P. C.) 49 (P. C.).

(3) 95 Ind. Cas. 898; 53 I. A. 142; A. I. R. 1926 P. C. 68; 24 A. L. J. 622; (1926) M. W. N. 503; 48 A. 443 (P. C.)

Having regard to the point of view expressed above we are of opinion that the case was properly treated by the learned Subordinate Judge as falling within the purview of the r. 99 of O. XXI of the C. P. C., and is not affected by the rule of *pendente lite*.

We dismiss this appeal with costs.

A. N. A. *Appeal dismissed.*

MADRAS HIGH COURT.
SPECIAL BENCH.

November 11, 1925.

Present:—Sir Victor Murray Coutts Trotter, Kt., Chief Justice, Mr. Justice Krishnan and Mr. Justice Beasley.

In re Sheikh ABDUL KADIR MARAKAYAR & CO.

Income Tax Act (XI of 1922), ss. 32, 33, 66—Proceedings under s. 33—High Court, power of, to compel Commissioner to state case—Limitation—Discretionary power—Long delay, effect of.

Sub-sections (2) and (3) of s. 66, Income Tax Act, are in terms limited to orders passed under ss. 31 and 32. The High Court has, however, the power under the general powers under the Specific Relief Act to compel the Income Tax Commissioner to state a case embodying any point of law that may arise even in the course of proceedings under s. 33. [p. 222, col. 1.]

Obiter:—Although, the period of limitation for an application which relates to an order under s. 31 or s. 32 has no application to an application made in respect of an order under s. 33, the jurisdiction conferred by s. 45 of the Specific Relief Act is discretionary and in the case of unreasonable and inexcusable delay the High Court would refuse to exercise its jurisdiction. [*ibid.*]

Application under s. 45 of the Specific Relief Act and s. 66 of the Indian Income Tax Act.

Mr. *K. S. Krishnaswami Iyengar*, for the Assessee.

Mr. *M. Patanjali Sastri*, for the Commissioner.

JUDGMENT.—By s. 66 (1) of the Income Tax Act, 1922, it is enacted "If, in the course of any assessment under this Act....a question of law arises, the Commissioner may, either on his own motion or on reference from any income-tax authority subordinate to him, draw up a statement of the case and refer it with his own opinion thereon to the High Court" and by sub-s. (2) "Within one month of the passing of an order under s. 31 or s. 32, the assessee in respect of whom the order was passed may, by application accompanied by a fee

of Rs. 100 or such lesser sum as may be prescribed, require the Commissioner to refer to the High Court any question of law arising out of such order, and the Commissioner shall, within one month of the receipt of such application, draw up a statement of the case and refer it with his own opinion thereon to the High Court."

There is a proviso with which we are not concerned enabling the assessee, if the final determination of the Commissioner under s. 33 is favourable to him, to withdraw his application and get a refund of the fees that he paid. By sub-s. (3) "If, on any application being made under sub-s. (2) the Commissioner refuses to state the case on the ground that no question of law arises, the assessee may apply to the High Court, and the High Court, if it is not satisfied of the correctness of the Commissioner's decision, may require the Commissioner to state the case and refer to it, and, on receipt of any such requisition, the Commissioner shall state and refer the case accordingly."

It is clear that sub-ss. (2) and (3) of s. 66 are in terms limited to orders passed under ss. 31 and 32. As to orders in review passed by the Commissioner under s. 33 as in the present case there is nothing to operate upon except 66 (1) and the assessee has no remedy unless we hold that the Court has power to order the Commissioner to state a case embodying any point of law that may arise in the course of proceedings under s. 33. The Privy Council has held in *Alcock, Ashdown and Co. Ltd* v. *Chief Revenue Authority of Bombay* (1) that the words of the older Act of 1918 import a mandate to the Commissioner to state a case where a real point of law arises, and has further held that if he improperly declines to do so the Court may compel him under the general powers of the Specific Relief Act. It is conceded by Mr. Patanjali Sastri that sub-ss. (2) and (3) of s. 66 of the present Act only apply to orders under ss. 31 and 32; but he asks us to draw the inference that the power of the High Court was meant to be confined to cases under those sections and was by implication taken away in the case of orders under s. 33. The result would be that the Commissioner by calling up the records under s. 33 would be in a position to burke any further enquiry whatever. We do not think that that can have been intended and we accordingly hold that the principle of *Alcock Ashdown and Co Ltd.* v. *Chief Revenue Authority of Bombay* (1) must be applied to orders under s. 33. It follows that the Statute has set a period of limitation on applications which relate to orders passed under ss. 31 and 32 and not on those which relate to orders passed under s. 33. The answer appears to be that the jurisdiction conferred by s. 45 of the Specific Relief Act is discretionary and that in the case of unreasonable and unexcused delay the Court would refuse to exercise it.

The Court, therefore, directs the Commissioner to state a case it not being seriously contended that there is not a substantial point of law involved. Costs of this application reserved.

V. N. V. *Order accordingly.*

(1) 75 Ind Cas. 392; 47 B. 742; 21 A. L. J. 689; 25 Bom. L. R. 920; (1923) M. W. N. 557; A. I. R. 1923 P. C. 138; 33 M. L. T. 267; 45 M. L. J. 592; 18 L. W. 918; 39 C. L. J. 302; 28 C. W. N. 762; 50 I. A. 227 (P. C.).

OUDH CHIEF COURT.

MISCELLANEOUS APPEAL NO. 37 OF 1926.

December 1, 1926.

Present:—Mr. Justice Misra and Mr. Justice Raza.

RAM NARAIN—APPLICANT—APPELLANT

versus

Musammat GOURA WIDOW OF SUCHIT—OBJECTOR—RESPONDENT.

Guardians and Wards Act (VIII of 1890), s. 13—Appointment of guardian—Property belonging to minor, existence of, whether necessary.

It is not an essential preliminary to the taking of proceedings for the appointment of a guardian under the Guardians and Wards Act that the minor should be proved to be possessed of property. [p. 223, col. 1.]

The fact that the minor's right to property is in dispute and has not been established in a Civil Court is, therefore, no bar to the appointment of a guardian under the Act [*ibid.*]

Appeal against an order of the District Judge, Lucknow, dated the 24th May, 1926.

Mr. *Motilal Saksena*, for the Appellant.

Mr. *G. N. Mukerji*, for the Respondent.

JUDGMENT.—This is an appeal from an order of the District Judge, Lucknow, dated the 24th May, 1926, under the Guardians and Wards Act (VIII of 1890).

The applicant Ram Narain is the father of the minor, *Musammat* Pinjan. She is alleged to be the widow of one Bhagwandin

Kurmi who died in 1925. It is alleged that she is entitled to the property left by Bhagwandin deceased.

The application was opposed by *Musammat* Goura, who alleges that she is the mother of Bhagwandin deceased and that Bhagwandin was never married to any woman.

The learned District Judge dismissed the application on the ground that it was an essential preliminary to taking any proceedings under the Guardians and Wards Act that the minor should be shown to be possessed of property and that it was necessary that the applicant should at first, as next friend of the minor, establish the right of the minor to the property in dispute.

We are not prepared to agree with the learned District Judge on that point, under the circumstances of the case. It was not necessary for the learned Judge to find in this case whether the minor was really possessed of the property in dispute. When her father is appointed guardian of the property, which is said to be the minor's property, he will take the necessary steps to recover it (if necessary). Section 13 of the Guardians and Wards Act provides that "on the day fixed for the hearing of the application, or as soon afterwards as may be, the Court shall hear such evidence as may be adduced in support of or in opposition to the application." So far as we see, the procedure adopted by the learned District Judge in this case was not according to law and vitiated the whole inquiry necessary for the purpose of disposing of the application under consideration. The learned District Judge has referred to the case of *Balmukund* v. *Janki* (1). It was held in that case that "where a person claims the custody of a female minor on the ground that she is his wife and such minor denies that she is so, Act IX of 1861 does not apply. Such person should establish his claim by a suit in the Civil Court." This was the ruling under the old Act. We do not agree with the learned District Judge that the principle of that decision applies to the present case.

We, therefore, allow the appeal and setting aside the order of the lower Court, remand the case to the lower Court with direction to restore it to its original number in the register and proceed to determine it according to law. The parties will bear their own costs in this Court.

A. N. A. *Case remanded.*

(1) 3 A. 403; A. W. N. (1881) 6; 2 Ind. Dec. (N. S.) 224.

MADRAS HIGH COURT.

CITY CIVIL COURT APPEAL No. 109 OF 1923.

March 1, 1926.

Present:—Justice Sir William Watkins Phillips, KT.

P. V. ARUMUGAM PILLAI, DEAD, AND ANOTHER—PLAINTIFFS AND HIS LEGAL REPRESENTATIVE—APPELLANTS

versus

MALIPATHI MUTHIAH CHETTY—DEFENDANT No. 1—RESPONDENT.

Mortgage—Redemption of usufructuary mortgage—Construction of document—Interest, whether charge—Interest on taxes and repairs—Accounts, failure to keep, effect of.

Where a usufructuary mortgage document provided that interest was to be paid at the rate of 1½ per cent. per mensem and after providing for deduction of Rs. 12 for rent, the mortgagee undertook to pay "the balance of Rs. 3 towards interest and bear the expenses of assessment, quit rent, repairs etc.," in a suit for redemption of the mortgage:

Held, (1) that interest upon the mortgage amount was also secured upon the property; [p. 224, col. 1.]

Bysani Madhava Chettiar's Charity Fund v. *Krishnaswamy Chetty* (1) distinguished.

(2) that if the mortgagee in possession had failed to keep accounts, he would not be entitled to make any reduction on account of repairs in the absence of clear evidence therefor; [p. 224, col. 2.]

(3) that the amount of rent should be first deducted before interest on taxes and repairs was calculated. [*ibid.*]

Appeal and memorandum of cross-objections preferred against the final decree of the City Civil Court, Madras, dated the 22nd December 1922, in O. S. No. 8 of 1921.

Messrs. *A. Krishnaswami Ayyar* and *N. Rama Iyer*, for the Appellants.

Mr. *C. S. Venkatachari* and *C. Narasimhachari*, for the Respondent.

JUDGMENT.—This is an appeal in reference to an account taken upon a mortgage of which redemption has been decreed. The first objection taken by the appellant is that the interest on the principal and other amounts are not charged on the property and he relies upon a decision of mine in *Bysani Madhava Chettiar's Charity Fund* v. *Krishnaswamy Chetty* (1). In that case I held upon the construction of the document that the interest upon the mortgage-money was not secured upon the property and that it was a personal covenant to pay the amount. The language of

(1) 72 Ind. Cas. 987; 16 L. W. 743; A. I. R. 1923 Mad. 71.

the document now under consideration is in some respects similar but I think it must be distinguished from the deed in the other case. In the former case one important stipulation was a promise to repay the principal amount only on a certain date, from which it can reasonably be inferred that that amount, and not that amount plus interest, was the mortgage amount. Here we have a recital as to the principal, then follows the recital that interest is to be at the rate of $1\frac{1}{2}$ per cent. per mensem and following that we have the stipulation which the appellant contends is merely a personal covenant to pay after deducting the rent of Rs. 12 received *i. e*, "we shall ourselves pay the balance of Rs. 3 towards interest and bear the expenses of assessment, quit rent, repairs etc." This is qualified by another statement that "as soon as you make a demand for the total amount at any time we shall pay it forthwith." The total amount consequently includes the principal as well as any other amount that is due and there is no distinction drawn between the principal and other amounts, I think it may reasonably be taken that it stands upon the same footing. The fact that there is a recital that "if rent is not realised we shall pay interest of Rs. 15 every month above mentioned without raising any objection" is not I think important, for the provision is only to apply when no rent at all is being reserved. I must, therefore, reject this contention and hold that the interest, assessment, etc., are charged upon the property. The Commissioner who took the accounts has had some difficulty in arriving at the correct figure because prior to 1913 the mortgagee failed to keep accounts as he was bound to do under s. 76 of the Transfer of Property Act. No doubt an inference adverse to his claim may be drawn from this fact, and it is contended that as he had not proved the payment of municipal taxes, quit rent and repairs, he is not entitled to claim the same. It is quite clear that the municipal taxes and the quit rents have been paid and the lower Court has found on the circumstantial evidence that these taxes must have been paid by the mortgagee in the absence of definite evidence on either side as to such payment. I think this inference may be supported in so far the municipal taxes and quit rents are concerned. As regards repairs, no such inference is possible because the amount of repairs is not a fixed amount and varies according to the wishes of the landlord or of the mortgagee as the case may be and may be payable or have been paid by the tenants. I think, therefore, that an inference from the absence of an account, must be drawn against the mortgagee and hold that the money calculated by the Commissioner for repairs prior to 1913 must be excluded. The lower Court has held that the Commissioner has allowed too much for repairs and without going into the question has simply reduced the Commissioner's figure by a lump sum without giving the data for such a reduction. This, I think, is wrong. The repairs have been estimated in the preliminary judgment as costing Rs. 500 and that amount is the most that can be allowed in this respect.

Another mistake committed by the Commissioner is in charging the interest on taxes and repairs before deducting the rent received. This is clearly wrong. The rent should certainly be deducted before interest is charged.

Apart from this I am of opinion that if there is a charge of interest on taxes, etc., the mortgagor would equally be entitled to interest on the excess of rent which was received in many years, but inasmuch as there is no stipulation in the document for the payment of interest this interest may well be left out of account altogether.

Section 72 of the Transfer of Property Act will not help the mortgagee for there is no evidence that taxes and quit rent were paid in order to save the property from destruction or loss. Accounts have, therefore, to be taken in the light of the above remarks, for the rates of rent, and taxes given by the Court are not seriously questioned here.

This appeal is adjourned till Monday next in order to ascertain the amount due in accordance with the above conclusions.

As a result of the above calculation a small balance is found due to plaintiff. There will be, therefore, a decree for possession of the suit property with costs of this appeal. The memorandum of objections is dismissed.

V. N. V. *Decree modified.*

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 428 OF 1926.

October 28, 1926.

Present:—Sir Cecil Henry Walsh, KT., Acting Chief Justice, and Mr. Justice Banerji.

MANTOO TEWARI AND OTHERS—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Cr. P. C. (Act V of 1898), ss. 263, 264, 356—Summary trial—Notes of evidence, whether part of record.

In cases to which ss. 263 and 264 of the Cr. P. C. are applicable, a Magistrate is perfectly free to take such notes of the evidence as he pleases, or if he prefers, to take none at all, and whether he takes notes or whether he does not, whatever notes he makes are his private property which he can treat exactly as he pleases. The provisions of these sections are not controlled by s. 355 of the Code and the Magistrate is not bound to make such notes part of the record. [p. 227, col. 1.]

Criminal reference made by the Sessions Judge, Benares, dated the 19th June, 1926.

REFERRING ORDER.

Boys, J.—This Reference by the learned Sessions Judge of Benares deals with a point of procedure which leads to constant discussion, and though in the particular case before me I have no doubt as to what the decision should be, it is desirable that the matter should be considered by two Judges as the ruling of this Court will govern the conduct of every summary trial throughout the Province for the future.

The question is whether, if in a summary trial a Magistrate takes notes of the evidence, he is obliged to make those notes part of the record. Before referring the case I will make a few observations as the result of my consideration of it to save the time of the Bench before whom the case may come. The learned Sessions Judge has asked that "a definite ruling might be made by the Hon'ble High Court as to whether it is necessary briefly to record evidence in appealable cases and whether if rough notes be made of the evidence, it is necessary that such notes should be kept and form part of the record." I note first that the learned Judge refers to "appealable cases." The case before him was not one of appeal but an application for revision. The sentence was only Rs. 50 and though in addition to that there was an order for security, that order was passed under s. 106 of the Cr. P. C. and was not passed under s. 118 and no appeal from that order would lie independently of the principal case. The question, therefore, as stated by the learned Judge does not actually arise. I understand, however, that what in substance he requires is a ruling of this Court as to whether a Magistrate in a summary trial may record notes or must record notes, and whether if in fact he does record notes, those notes must be made part of the record. He refers to *Satish Chandra Mitra* v. *Emperor* (1) and two cases reported in Indian Cases in which the same view was taken. It is hardly necessary to consider the two later cases. Their Lordships of the Calcutta High Court held that the record of the evidence which the Magistrate had destroyed should have been kept with and formed part of the record. They were of opinion that s. 263 only says that a Magistrate need not record the evidence, but that if he chooses to do so the provisions of ss. 355 and 356 come into play and that the record of the evidence must be made part of the record of the case. That case is clearly distinguishable from the present. It is not suggested here that the Magistrate in the exercise of his discretion decided to "record the evidence." He did no more than take a few "notes." This decision, therefore, of the Calcutta High Court has no bearing on the present question which is merely whether a Magistrate deciding not to record the evidence but making a few notes of that evidence must keep those notes on the record. I have no doubt myself that he need not do so. It may be a question of some difficulty in a particular case whether a particular piece of paper on which are recorded facts stated by the witnesses amounts to a "record of evidence" or merely to notes, but there could rarely be serious difficulty. If a Magistrate means to "record evidence" he does so formally more or less completely and there can be no doubt about what the record was intended to be. On the other hand if he *jots* down a few notes, possibly unintelligible to anybody but himself merely for purposes of reference, there can be no doubt that such a document would not be a record of the evidence.

In regard to this latter type of notes it is, however, difficult to see how it could possibly be made part of the record apart from the fact that such notes would be frequently unintelligible. The Appellate Court must decide the case on the record and if it has

(1) 61 Ind. Cas. 846; 48 C. 280; 32 C. L. J. 451; 22 Cr. L. J. 462.

to look at a record of evidence, that record of evidence must be one kept in accordance with the requirements of the Cr. P. C.

I further note that there is no reference throughout the whole of the Cr. P. C. or the Evidence Act, so far as I am aware, to "notes" being taken of the evidence. It may be necessary to record evidence in full; it may be necessary to record a memorandum of the evidence, but there is no provision referring to "notes" as such.

It appears to me clear that when a Magistrate decides to try a case summarily he will first consider whether it is likely in the event of a conviction that an appealable sentence will be called for. If he decides that a non-appealable sentence will probably be sufficient, he will proceed under s. 263. In that case he not only need not record the evidence or a memorandum of the evidence, but he need not make any notes at all of the evidence and he need not even say in his judgment what the evidence was, except in so far as he must briefly state the reasons for his opinion. If he decides that an appealable sentence is required or if having decided that a non-appealable sentence will probably be sufficient, he subsequently has to change his mind, he must then embody in his judgment in addition to the particulars required by s. 263 "the substance of the evidence," in other words, the only difference between ss. 263 and 264 is that in appealable cases the judgment must contain "the substance of the evidence." In neither case need there be any record of the evidence or any memorandum of the evidence. I should, therefore, myself have no hesitation in holding that if a Magistrate for the purpose of assisting his own re-collection jots down a few notes, those notes are nothing more than the notes taken by any Judge hearing an appeal for his own assistance, and need not and should not form part of the record. Section 264 is precise that the judgment shall be the only record. I should, therefore, have no hesitation in myself holding that any notes that do not amount to a record of the evidence in the sense in which that term is ordinarily understood (*cf.* ss. 355 and 356) do not amount to a part of the record, need not be kept on the record and should not be kept on the record.

In view, however, of the universal application of the ruling that I would lay down to all summary trials throughout these Provinces, I think it is desirable that the case should be laid with the above remarks before two Judges.

Messrs. *Kummuda Prasad* and *Gadadhar Prasad*, for the Applicants.

The Government Advocate, for the Crown.

JUDGMENT.—In our opinion Mr. Justice Boys has taken the right view in this matter, and, so far as this High Court is concerned, we declare that the provisions of ss. 263 and 264, in cases in which those sections are applicable, are not controlled by s. 355, Cr. P. C. To attempt to apply them really introduces confusion and amounts to amending the Act. It seems to us that the matter is really quite clear, and has only been complicated by the decision in the case of *Satish Chandra Mitra* v. *Emperor* (1) with which we are unable to agree. Summary trials are dealt with in two different categories. Cases under s. 263 are unappealable. In such cases the Magistrate need not record the evidence, and he is only bound to enter the particulars mentioned in the section. In s. 264 he has to do a little more, namely, record a judgment embodying the substance of the evidence. There is nothing in that section compelling him to record the evidence. Some people have the gift of remembering, repeating and embodying in a judgment evidence which they have heard without the assistance of any note recording such evidence. Section 264 leaves a Magistrate, who thinks he is able to do that, perfectly free to do so if he likes, but if on the other hand, like at any rate, one member of this Bench, he finds it necessary to assist his recollection and his opinion by making, what you may call, notes or private memoranda or a temporary record of the evidence to aid him in coming to a satisfactory conclusion, such notes or memoranda form no part of the record of the case. They are only the vehicle which conveys to his mind the substance of the evidence which the section requires him to embody in the judgment. The section clearly enacts that the judgment embodying the substance of the evidence which the Magistrate has heard shall be the only record, and in our view we could not order or declare that the Magistrate was bound to make something else part of the record, not mentioned in the section, without adding to or amending the section. It appears to us, with all respect to the learned Judges who decided the matter in Calcutta, that in order to arrive

at the decision at which they did, it was necessary to jump over a very wide gulf. It is true, as the judgment points out, that the primary rule is embodied in s. 355, and that requires a Magistrate, in cases to which that section is applicable, to make a memorandum of the substance of the evidence in the case. That is a compulsory memorandum. Section 355, sub-s. (2), makes such memorandum, or in other words the compulsory memorandum, a necessary part of the record. The fact that such compulsory memorandum does not apply to summary trials under either s. 263 or s. 264, seems to be conclusively established by the language of s. 354. With great respect it seems to us that the judgment of the Calcutta High Court treated the voluntary memorandum, or notes, or pieces of paper, whatever you like to call it, which the Magistrate chose to use to assist himself, either in an unappealable case under s. 263, or in an appealable case under s. 264, in which he had to embody the substance of the evidence in the judgment, as on the same footing and subject to the same statutory requirements as a compulsory memorandum, which he was bound to take under s. 355. In our view the Statute does not justify us in taking that view, and we hold that in cases in which ss. 263 and 264 are applicable, the Magistrate is perfectly free to take such notes as he pleases, or if he prefers to take none at all, and whether he takes them or whether he does not, whatever notes he makes are his private property which he can treat exactly as he pleases.

As a matter of reasonable practice and common sense, which ought to solve most questions without the trouble of referring to a Statute at all, it seems to us that if it turned out that a case is appealable and an appeal is eventually brought, and the Magistrate happens to have taken private notes, and when he is asked if he will lend them or provide them to the Court of Appeal for the purpose of hearing the appeal, and they are still in existence, there is no reason at all why he should not do so. That is a practice which one member of this Bench has invariably followed in the exercise of original civil jurisdiction in this Court when an appeal has been brought from his judgment. A Magistrate may supply copies to the parties or send the original to the Court of Appeal. This is merely an act of convenience, and courtesy. A hard and fast rule issued by the District Magistrate that every Magistrate should destroy the notes, seems on the face of it, unnecessarily to hamper the discretion of his subordinate officers. It is often of great convenience when you are asked about something which happened in a case three months ago, it may have nothing to do with an appeal, it may relate to the conduct of some professional gentleman who was engaged in the case to be able to refer to your own private notes, which you happen to have preserved. You are thus able to refresh your recollection, just as a man of business is able to refresh his recollection as to what happened a long time ago from his books or diary, but we have no jurisdiction to dictate to the District Magistrate what he should do in this or any other matter, which is solely vested in his discretion, or to make any declaration about any order relating to such notes which he may have issued. The most we can do is to suggest, as we have done, a practical way of dealing with the matter.

We, therefore, reject the reference and direct the record to be returned to the Sessions Judge with the foregoing observations.

Z. K. *Reference rejected.*

CALCUTTA HIGH COURT.

CRIMINAL APPEAL No. 284 OF 1926.

August 16, 1926.

Present:—Sir George Claus Rankin, KT., and Mr. Justice Duval.

AZIMADDY AND OTHERS—ACCUSED —APPELLANTS

versus

EMPEROR—RESPONDENT.

Cr. P. C. (Act V of 1898), s. 162—Statements by accused persons, whether admissible—Evidence Act (I of 1872), ss. 27, 145, 155, 157, how far conflict with s. 162, Cr. P. C.—First Information Report, whether falls within s. 162, Cr. P. C.—Criminal trials—Admission of evidence of similar offence—Judge, duty of, to direct Jury as to value of such evidence—Penal Code (Act XLV of 1860), ss. 302, 149—Constructive multiple murder—Charge—Separate heads of charge for each murder, necessity of.

Section 162, Cr P C., as amended, has no application to statements of accused persons who are on their trial. [p. 229, col. 1]

Emperor v. *Nga Tha Din* (1), *Rannun* v. *Emperor* (2), *Jagwa Dhanuk* v. *Emperor* (3), followed.

The object of the said section is to prevent the statements of witnesses made before the Police from being used by the prosecution under ss. 145, 155 and 157 of the Evidence Act which sections are not confined to criminal cases, and not to repeal s. 27 of the Evidence Act. [p. 229, col. 2.]

The First Information Report against an accused is not a statement within the contemplation of s. 162, Cr. P. C., inasmuch as it is not made in the course of an investigation. However important First Information Reports may be, they do not prove themselves and have to be tendered under one or other of the provisions of the Evidence Act. [p. 229, col. 2; p. 230, col. 1.]

Statements made by third parties to the Police in the course of their investigation which are not recorded in writing cannot be used in evidence in any circumstance or for either side or for any purpose. [p. 230, col. 1.]

Emperor v. *Nga-Tha Din* (1), *Rakha* v. *Emperor* (5) and *Vithu Balu Kharat* v. *Emperor* (6), relied on.

Even if such statements are recorded in writing they cannot be used for any purpose but the one specified and that by the defence. [*ibid.*]

Counter informations laid against a complainant after the First Information against the accused, come under s. 154, Cr. P. C., and must be reduced to writing and signed and, therefore, cannot come within s. 162, Cr. P. C. Whether such information is admissible at the trial depends on the circumstances and has to be decided under the Evidence Act. [p. 230, col. 2.]

The Police cannot treat statements as information unless they are really received as such and come truly and properly within s. 154, Cr. P. C. [*ibid.*]

Where a Judge admits evidence to the effect that the accused had attempted to commit similar offences against the complainant as well as others, it is the duty of the Judge to explain most carefully to the Jury that they are not entitled to take it that the accused had committed the offence charged because they had previously been found to have attempted to commit similar offences. [p. 231, col. 1.]

Three persons killed three others respectively in an affray with a common object and as a part of the same series of transactions. They were all convicted under s. 302 read with s. 149, Penal Code, on one charge:

Held, (1) that the proper procedure would have been to have had three separate heads of charge; [p. 231, col. 2.]

(2) that it was unsafe to proceed upon the basis of s. 149, Penal Code, and unless the Appellate Court could go through all the facts and make a new finding for itself the conviction could not be upheld. [*ibid.*]

Emperor v. *Nga Tha Din* (1), followed.

Appeal against an order of the Sessions Judge, Assam Valley Districts.

Babu *Debendra Narain Bhattacharjee*, for the Appellants.

Babu *Satindra Nath Mukerjee*, for the Respondent.

JUDGMENT.

Rankin, J.—In this case there are 5 appellants. They have been convicted by the learned Sessions Judge of the Assam Valley Districts sitting with a Jury of seven. There had been a previous trial and the case was sent back by this Court to be re tried. The Jury on this occasion were unanimous.

They have found all the appellants guilty under s. 302 read with s. 149, Indian Penal Code. Three of them have also been found guilty under s. 302 by itself, while the other two have been found guilty under s. 324.

The fifth appellant Basir Haji is the father of appellants Nos. 1, 3 and 4 Azimaddy, Johiraddy and Rahimaddy. The second appellant Sayed Ali is a friend and neighbour.

The occurrence took place between 8 and 9 A. M. on the 7th March 1925. According to the prosecution it took place at the S. E. corner of the *patta* land of one Kimu where it abuts upon some *khas* land of which Basir and Sayed Ali were wanting to get settlement from Government. According to the defence it took place to begin with on the E. of Kimu's land and upon the adjacent plot of *khas* land marked N upon the plan. The prosecution story is that Kimu was erecting a hut at the S E corner of his own land when the accused with others came armed with spears and *lathis* to prevent this and that when he called certain people who were in the field, an altercation commenced and the accused proceeded to attack Kimu's party. Three people were killed undoubtedly and others injured.

The case for the defence is that the accused were proceeding to erect a hut on the *khas* land and that the complainant's party attacked them.

The individual acts of each accused are not really in doubt. The first appellant killed a man called Alimuddin with a spear. The second appellant killed Kalimuddin and the third killed Mokim in the like manner. The fourth appellant—a lad of about 18 years—struck Yaruddin with a spear in the buttock. Basir who was armed with a *ram-dao* struck Mukdum and cut his arm. The injuries of Yaruddin and Mukdum amounted only to simple hurt.

Three passages in the summing up are objected to by the learned Vakil for the appellants and as the first two of these raise questions under s. 162 of Cr. P. C., I will deal with them first.

The occurrence having taken place about 9 A. M., the First Information was given at the *thana* some five miles away at 12-30 P. M. by Abdul Basir, P. W. No. 1. At 2-30

P. M. on the same day the first appellant Azimaddy laid an informarion at another *thana* accusing the complainant's party.

The learned Judge admitted this latter document in evidence. It is Ex. 6. It contains a statement that Basir Haji was beaten but that there was no injury. At the trial it was part of the defence case that Basir had considerable injuries wholly unexplained by the prosecution evidence. The learned Judge on this point and on others put Azimaddy's information to the Jury. It is said that this is contrary to s. 162 of the Code.

The other passage to which the objection is taken explains itself. "On the other hand against the theory that the posts were in the first place erected by the accused on the land to the east we have Sub-Inspector Prodip Roy Deka's evidence that he found no trace of the erection of a house at the place pointed out to him by the accused Basir Haji, and Sub-Inspector Uday Chand Srama also says he found no trace of house having been erected there though he reached the place at 3 P. M. the next day." This too is said to be contrary to s. 162 of the Code.

The learned Vakil who appears for the prosecution contends that s. 162 of the Code as it now stands has no application to the statement of the accused persons who are on their trial. As regards the first of the two objections other points may arise—*viz.*, whether a First Information Report is within s. 162 at all and whether if so this particular information laid at 2 30 P. M. was made to a Police Officer "in the course of an investigation" begun presumably at 12-30 on receipt of the prior information.

Now the effect of s. 162 of the Cr. P. C., as amended in 1923 has been the subject of much doubt and this is creating difficulty in the conduct of trials. There are unreported cases in this Court in which s. 162 has apparently been assumed to apply to statements made by the accused. I find, however, that in the High Courts of Patna, Lahore and Rangoon it has been held that statements by an accused are not within the section. *Emperor* v. *Nga Tha Din* (1), *Rannu* v. *Emperor* (2), *Jagwa Dhanuk* v. *Emperor* (3). The first of these cases was decided by a Full Bench and the judgments including the dissenting judgment of Heald, J., deal very fully with the arguments *pro* and *con*.

In my opinion these decisions are right and should be followed in this Court. In this Court it is settled law *Queen-Empress* v. *Jadub Das* (4) that in spite of the generality of the language of s. 161 of the Code, that section does not apply to an accused. Both the context of s. 162 and its contents point in the same direction. "Any person" means *quivis ex populo*. It is unreasonable in view of the special law applicable to the statements of accused persons to the Police to refuse to apply the well-established rule "*generalia specialibus non derogant*." A contrary view involves an implied but complete repeal of s. 27 of the Evidence Act. A clear and intelligible purpose can be collected from the section without involving any such consequences, *viz.*, to prevent the statements of witnesses made before the Police from being used by the prosecution under ss. 145, 155 and 157 of the Evidence Act which sections are not confined to criminal cases. Lastly, while it is clear that s. 162 though amended in the interests of accused persons does abridge certain rights of an accused in the matter of evidence, it would seem to require express and compelling language to deprive an accused of what is so often the main stay of a good defence—the right to show that the moment he was challenged he gave the explanation on which he still relies. It is difficult to believe in this as an amendment designed in the interest of accused persons; while on the contrary view, it is comparatively easy to see that the rights of accused persons have been no further abridged than may well have been thought necessary for the purpose above-mentioned. As this question has been thrashed out in the cases to which I have referred I prefer to put any further observations in the form of a statement of the law as I understand it.

The First Information Report against the accused is clearly not a statement within the contemplation of s. 162 because it is not made in the course of an investigation. Again s. 154 requires it to be signed,

(1) 96 Ind. Cas. 145; 4 R. 72; 5 Bur. L. J. 30; A. I. R. 1926 Rang. 116; 27 Cr. L. J. 881.

(2) 94 Ind. Cas. 901; 7 L. 84; A. I. R. 1926 Lah. 88; 27 Cr. L. J. 709.

(3) 93 Ind. Cas. 884; 5 Pat. 63 at p. 77; A. I. R. 1926 Pat. 232; 27 Cr. L. J. 484; 7 P. L. T. 396.

(4) 27 C. 295; 4 C. W. N. 129; 14 Ind. Dec. (N. S.) 194.

whereas statements within s. 162 are forbidden to be signed even when recorded in writing. It is usually put in by the prosecution which in any ordinary case has a duty to put it in. But, however important First Information Reports may be, they do not prove themselves and have to be tendered under one or other of the provisions of the Evidence Act. The usual course is for the prosecution to call the informant and for the First Information to be tendered as corroboration under s. 157, but it could also be tendered in a proper case under s. 32 (1), as a declaration as to the cause of the informant's death, or as part of the informant's conduct (of the *res gestæ*) under s. 8. Theoretically, the defence could prove the information to impeach the informant's credit under s. 155 or to contradict him under s. 145.

Statements made by third parties to the Police in the course of their investigation stand under the Evidence Act as follows:— They can be used as corroboration under s. 157 or in contradiction under s. 145, or to impeach credit under s. 155 provided the person who made the statement is called as a witness. This would apply to the prosecution and to the defence indifferently under the Evidence Act. But s. 162 of the Cr. P. C. enacts *first*, that if such a statement is not recorded in writing it cannot be used in evidence in any circumstance or for either side or for any purpose. This view of the section has been dissented from in one case at least in Madras but it is, in my opinion, right and it has been adopted by at least three High Courts: *Emperor* v. *Nga Tha Din* (1), *Rakha* v. *Emperor* (5) and *Vithu Balu Kharat* v. *Emperor* (6).

Secondly, if such a statement has been recorded in writing then it cannot be used for any purpose but one and that by the defence. Provided that the person who made it is called as a witness for the prosecution the defence may apply for a copy of the statement and if it be proved may use it under s. 145 of the Evidence Act to contradict that witness.

Two overriding considerations have to be noticed in connection with s. 162 (1) that the section does not affect any statement as to the cause of death under s. 32 (1) of the Evidence Act; (2) that the section is dealing with "statement" not with conduct in the sense of s. 8 but with mere statements.

It sometimes happens that after the First Information has been laid against the accused, a counter-information is laid against the complainant or his party by a member of the accused's party who is not himself an accused. As this comes under s. 154 and must be reduced to writing and signed, it cannot in my opinion come within s. 162. Whether it is admissible at the trial of the accused will depend upon the circumstances and must be decided under the Evidence Act. The Police cannot of course treat statements as information unless they are really received as such and come truly and properly within s. 154.

Statements made by an accused belong to a class which the Evidence Act calls "Admissions" (ss. 17, 18) and *prima facie* they are evidence against the maker but not in his favour. "Confessions" are a sub-species of "statements" and a species of admissions. Sections 24, 25 and 26 of the Evidence Act provide that in criminal cases confessions are irrelevant if they are induced by threat or promise, and are inadmissible as against the accused if made to a Police Officer, or if made while the accused is in custody (unless made in the presence of a Magistrate). As s. 162 of the Cr. P. C., is only concerned with statements made to a Police Officer, I need only observe here that broadly speaking a statement made by an accused to a Police Officer may be proved against him under the Evidence Act if it is not a confession; and even if it is a part of a confession it is admissible under s. 27 if a fact is deposed to as discovered in consequence of the information. In my opinion s. 162 of the Cr. P. C. does not disturb this position.

In the present case the two objections which I have referred to as made against the summing up of the learned Judge are not sustainable on this construction of s. 162. Both statements are statements by an accused; neither is a confession nor part of a confession; and one is an information recorded under s. 164.

There is, however, a third objection to the summing up which is well founded. It appears that a complaint to a Magistrate was put in evidence to show that the accused's party had been trying to interfere with certain land in the possession

(5) 93 Ind. Cas. 230; 6 L. 171; 2 L. C. 62; A. I. R. 1925 Lah. 399; 27 Cr. L. J. 438.

(6) 83 Ind. Cas. 1007; 26 Bom. L. R. 965; A. I. R. 1924 Bom. 510; 26 Cr. L. J. 223.

of Mokim and there was other evidence that a similar interference with the rights of others had been attempted by the accused in the case of one Monu Fakir. I will not here consider the course of the case so as to enquire whether either or both pieces of evidence were relevant or were properly admitted at all. There seems in this case to be some reason for saying that they could not have been rejected. But the learned Judge in dealing with that matter says as follows:—"This is the information given by Mokim of an occurrence alleged to have taken place three days before this occurrence (Ex. 4 read). If this information and the evidence that Monu was driven out of the plot (L) is true it would show that Basir Haji's party were capable of taking the aggressive though they were numerically weaker having only 2 *baris* containing (according to Kimu) 20 or 30 houses, while in Kimu's Samaj there were 25 or 30 *baris*. Now, it seems to me that it was necessary for the learned Judge if he let in those two pieces of evidence at all to explain most carefully to the Jury that the Jury were not entitled to take it that the accused had committed the offence charged because they had previously been found to have attempted to commit similar offences. The learned Judge has not only given no such direction but the direction which he had given must have been taken by the Jury as intended to be the contrary, for he says that these previous circumstances would show that Basir Haji's party were capable of being the aggressors. This makes it necessary for us to consider carefully the question whether certain of the charges upon which the appellants have been convicted can be sustained. All the accused were found guilty under s. 302 read with s. 149. The common object alleged was to prevent Kimu from erecting a hut upon his own land or to interfere with his possession, If, therefore, there has been a misdirection going to the question which of these two parties was really the aggressor that misdirection seems to affect vitally any conviction under s. 149.

There is another objection to the conviction under s. 149. Apparently in this part of the world the Courts think no more of killing three men in one charge than the accused persons are supposed to do of killing three men in one fight, and the form of charge which has been employed in this case can only be described as a charge of constructive multiple murder. It is clear that the proper way would be to have had three separate heads of charge and the law upon this subject was laid down in the case of *Radha Nath Karmakar* v. *Emperor* (7). It is, however, plain that the three murders were all part of the same series of transactions and it is clear that three separate heads of charge could have been employed in the present case. The decision to which I have just referred was one in which in similar circumstances this Court thought it unsafe to proceed upon the basis of s. 149 and it appears to me that unless this is a case where the Court will go through all the facts and make a new finding for itself, it is not a case in which it is possible for the Court to uphold the conviction against all these appellants under s. 302 read with s. 149. I do not think that it is reasonable or right for us to try this case on the paper book for ourselves as regards that particular point.

Having come to that finding, the next question is as to the consequence of this finding upon the other charges. Three of the accused have been found guilty under s. 302 by itself; but if there be any doubt as to the spot upon which this fight began it is, at any rate, unsafe to say that those three appellants would not have had some case upon the question of private defence. It is quite clear on the facts of this case that they could not justify committing murder in the way they did under any right of private defence, and it is, therefore, certain that they must be convicted under s. 304 (1) Their other convictions are set aside. We have considered this matter carefully as regards the sentence and we are of opinion that it would be unjust to leave the sentence of transportation for life without substantial reduction and, in our opinion, the proper sentence for us to pass upon those three appellants is the sentence of ten years' rigorous imprisonment, under s. 304 (1).

That leaves the case of Basir Haji and Rahimuddy who is the youngest of the three sons—apparently in the neighbourhood of 18 years of age. They have been convicted under s 324 and until one settles the question whether there was some right of private defence it is difficult to say that the infliction of simple hurt may not have

(7) 71 Ind. Cas. 120; 50 C. 94; 36 C. L. J. 149; A. I. R. 1922 Cal. 573; 24 Cr. L. J. 72.

been justified. In their cases we are, therefore, faced with the alternatives of sending the case back for re-trial or setting aside their convictions and refusing to order a re-trial. So far as the youngest son Rahimuddy is concerned, as his father and his elder brothers were engaged together upon this land dispute, a reasonable knowledge of human nature leads one to suppose that he had not very much chance of keeping out of it. So far as he is concerned, as he only inflicted a simple hurt, I do not find very much difficulty in setting aside the conviction against him and refusing to allow him to be re-tried. I have, however, much more difficulty in the case of the father Basir Haji who is very probably, to put it no higher, the main source of all the trouble. It is, however, I think, important to notice that if this case is tried again at this distance of time and after two previous trials it is almost inevitable that the third trial will be somewhat unjust. The witnesses must have forgotten much and the third trial would be, it seems to me, of a very difficult and doubtful nature. If I could have found any logical way of finding him guilty under s. 324 I confess I should not have been particularly sorry; but it seems to me that there is no logical way of finding him guilty under s. 324 except by doing, what I for one refuse to do, what it would be difficult to do and what we should have to do in respect of all the appellants, namely, finding for ourselves on the paper book who was really the aggressive party and on what exact spot. For these reasons all the convictions of Bashir Haji and Rahimuddy will be set aside and, in the circumstances, we do not order a re-trial.

Duval, J.—I agree.

A. N. A. *Appeal allowed: Convictions partly set aside.*

OUDH CHIEF COURT.

CRIMINAL APPEAL No 420 OF 1926.

December 2, 1926.

Present:—Sir Louis Stuart, KT, Chief Judge, and Mr. Justice Raza.

SHEO BALAK—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Evidence Act (I of 1872), s. 24—Confession to reliable and respectable witness—Accused not in Police custody—No duress or undue influence—Confession, value of.

Where a confession is made by an accused person while he is not in Police custody, to a respectable and reliable person and the confession is not obtained as a result of duress or undue influence, it is very reliable and valuable evidence against him and upon this confession alone he can be found guilty. [p. 233, col. 2.]

Appeal against an order of the Sessions Judge, Sitapur, dated the 30th October, 1926.

Mr. *H. Husain*, for the Appellant.

Mr. *H. K. Ghose*, Government Pleader, for the Respondent.

JUDGMENT.—Sheo Balak has been convicted by the learned Sessions Judge of Sitapur of the offence of murder under s. 302 of the Indian Penal Code, and sentenced to death subject to confirmation by this Court. He appeals. The reference in confirmation is also before us. He has been defended by a competent Counsel who has stated every point that could be stated in his favour. The facts are these:

Sheo Balak is a Brahman, about 30 years of age, one of four brothers. Sheo Balak resided in Kherwa, a hamlet of Jairampur in the Sitapur District. It is established by the evidence of Suraj Bakhsh, and Thakur Anrudh Singh, the latter of whom was the employer of Sheo Balak, that there has been a dispute between Sheo Balak on the one side and two of his brothers Ram Lal and Ganesh on the other side as to the division of property and that the feelings between the appellant and those two brothers, who are the persons who have been murdered, were very acute. It is proved beyond the possibility of doubt that on the 3rd June 1926 a Pasi came to Kherwa and handed to Ram Lal some *peras* (these are sweets made of sugar and thickened milk) and four pice in cash saying that they had been sent to him by the Pandit of Bijwamau. Ram Lal ate some of the *peras* and gave some to his brother Ganesh who ate them also; other of the *peras* were left untouched. Shortly after they had eaten the *peras*, Ram Lal and Ganesh were seized with violent pains and vomited. Ram Lal told Suraj Bakhsh and Matadin *chaukidar* that he had received these *peras* at the hands of a Pasi, whom he did not know. Matadin *chaukidar* went at once to the Kamalpur Police Station where he made the report that these two persons had been poisoned. They died a few hours after the *chaukidar* had gone to make the report.

The strained relations between the appellant and his two brothers being well known in the village, suspicion fell upon the appellant but until it was discovered who was the unknown Pasi who had brought the *peras*, the matter was not likely to be cleared up. Thakur Anrudh Singh, the employer of the appellant, is a leading landholder and the joint onwer of the Jairampur village. He is also an Honorary Magistrate. When the Police Officer engaged in the investigation arrived Thakur Anrudh Singh agreed to give all the assistance that he could in order to discover who was guilty of the murder of these two men. He has shown throughout a very laudable desire to do his duty in the public interests. The first clue, as to this Pasi, was obtained from a man called Panna a ferry man, who works a ferry on the Sarain river which separates the village of Jairampur from the village of Gumta. He remembered that on the date of poisoning (the 3rd of June 1926) he had ferried from Gumta to Jairampur the appellant with a certain Jangi Pasi of Gumta. Panna mentioned this fact to the village barber Chunni and Chunni mentioned the fact to Thakur Anrudh Singh. In consequence of this Jangi Singh was sent for. The evidence of Panna and Chunni as well as that of Thakur Anrudh Singh is on the record. After this the appellant made a statement to Anrudh Singh. We now come to the evidence against him. The main witness against him is Jangi Pasi who has deposed that he was the man who brought the *peras*. He says that he received them from the appellant who told him to state that they had come from a person who was perfectly innocent Chhutku Pandit of Bijwamau and that he handed them to Ram Lal. There is further the evidence of Thakur Anrudh Singh that the appellant confessed to him that he had sent the *peras* in this manner to his two brothers and had poisoned them. The medical evidence establishes beyond the possibility of doubt that these two men died as a consequence of poisoning with arsenic. Arsenic was found in their viscera. Arsenic was also found in the uneaten *peras*. The first point that we have to discuss is whether the statement, which the appellant is proved to have made to this respectable and reliable witness Thakur Anrudh Singh, is admissible in evidence. We find clearly that the statement is admissible in evidence. We do not agree with the learned Sessions Judge in his doubts as to whether the appellant was or was not in Police custody when he made the statement. Upon the facts we find clearly that he was not in Police custody when he made the statement. We believe that he made this confession to Thakur Anrudh Singh and that this confession was not obtained as a result of duress or undue influence. It is very reliable and valuable evidence against him and upon this confession alone we would find him guilty, but apart from that we see no reason to distrust the evidence of Jangi in respect of the bringing of the *peras* to Ram Lal. It is true that Jangi was probably an accomplice but his evidence upon the point is clearly corroborated and is admissible against the appellant. The learned Counsel for the appellant, who put forward the best case that could be put forward for his client, laid stress amongst other points upon the improbability of a Brahman receiving sweets from the hands of a low caste man like a Pasi. Sweets, however, can be taken from the hands of a man of lower caste and we notice that in the present instance the incident does not seem to have struck any one as unusual. In the first report made by the *chaukidar* it is stated distinctly that Ram Lal had said that a Pasi had brought the sweets. He made this statement to Suraj Bakhsh. Suraj Bakhsh is also a Brahman and Suraj Bakhsh does not appear to have considered that there was anything unlikely in the story of sweets having been taken from the hands of a Pasi. It would further be noted that the learned Sessions Judge, an officer of considerable experience, who has tried the case carefully and well, is himself a Brahman and he does not appear to have considered that there was any peculiarity in the story. For the above reasons we dismiss the appeal and confirm the conviction. In respect of the sentence there is nothing to be said in favour of the appellant. He is a man of 30, who in a treacherous and cold-blooded manner poisoned his own brothers. We confirm the sentence and direct that Sheo Balak be hanged by the neck till he be dead.

A. N. A. *Sentence confirmed.*

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 577 OF 1926.
August 17, 1926.
Present:—Mr. Justice Mukerji and
Mr. Justice Roy.

BADU MIR AND ANOTHER—ACCUSED—PETITIONERS
versus
EMPEROR—OPPOSITE PARTY.

Cr. P. C. (Act V of 1898), ss. 110, 118—Registration under Criminal Tribes Act—Security proceedings, legality of—Criminal Tribes Act (III of 1911), s. 4, effect of.

While the control that is obtained over a person by registering him as a member of a criminal tribe is sufficient to prevent him from committing many of the acts for which preventive action under Ch. VIII, Cr. P. C., may be necessary, he has notwithstanding such control enough liberty left in him to pursue a career of crime bringing him within some of the cls. (*a*) to (*e*) of s. 110, Cr. P. C., or to prove himself dangerous to society within the meaning of cl. (*f*) of that section. [p. 234, col. 2.]

The question whether a person who has been registered as a member of a criminal tribe, can be proceeded against under s. 118, Cr. P. C., depends, therefore, on the facts and circumstances of each particular case. Each case has to be scrutinised on its merits, the information upon which proceedings are asked for being scanned and the question whether preventive action is called for or not being considered, due regard being also had to the consequences which in most cases will inevitably follow, namely, that there would be failure to furnish sureties. If such proceedings appear to be necessary in view of the exigencies of any particular case, evidence of general repute which is bound to be affected in a large measure by the very fact of the person proceeded against being a member of a criminal tribe, should be, if at all, acted upon with great caution and scrutiny. [p. 234, col. 2; p. 235, col. 1.]

The fact that the reputation of such persons continued the same as it was when they were registered as members of a criminal tribe is no ground for taking further preventive action. The important thing in such cases is to see what they have done after such registration. [p. 235, col. 1.]

Criminal revision against an order of the Sessions Judge, Mymensing, dated the 21st April, 1926, confirming that of the Sub-Divisional Magistrate, Mymensing, dated the 15th March, 1926.

Babu *Suresh Chandra Taluqdar* and *Mohindra Kumar Ghosh*, for the Petitioners.

Babu *Profulla Chandra Chakrabarty*, for the Opposite Party.

JUDGMENT.—The two petitioners in whose favour this Rule has been issued have been bound down under s. 118, Cr. P. C., to be of good behaviour for 3 years, each in a bond of Rs. 500 with two sureties of the like amount. One of the grounds of the Rule is to the effect that the proceedings were inexpedient or illegal in view of the fact that the petitioners had already been registered as members of a criminal tribe. The other ground on which the Rule has been issued is to the effect that the security demanded is excessive.

In support of the first of the grounds reliance has been placed upon the decision of this Court in the case of *Ghulam Rasul* v. *Emperor* (1). In that case the question of legality or propriety of instituting proceedings under s. 110, Cr. P. C., against persons who had already been registered as members of a criminal tribe came up before this Court for consideration. The learned Judges declined to quash the proceedings in that case as the facts had not yet been gone into in the trial Court. Richardson, J., expressed the view that while it could not be laid down as a fixed and immutable rule a person who has once been registered under the Criminal Tribes Act cannot be proceeded against under s. 110, Cr. P. C, the fact of such registration was an important factor which should be taken into consideration before an order is made binding down under s. 118, Cr. P. C., a person so registered. Huda, J., was of opinion that the proceedings were inexpedient as the control which is obtained over a person as soon as he is brought under the Criminal Tribes Act should ordinarily be sufficient to attain the preventive object which s. 110 Cr. P. C., aims at, and also because the inevitable consequences of demanding surety from such a person would be to send him to Jail.

Having examined the provisions of the Criminal Tribes Act (III of 1911) and perused the rules framed thereunder it seems to me that while the control that is obtained over a person by registering him as a member of a criminal tribe is sufficient to prevent him from committing many of the acts for which preventive action under Ch. VIII of the Cr. P. C., may be necessary, he has, notwithstanding such control, enough liberty left in him to pursue a career of crime bringing him within some of the cls (*a*) to (*e*) of s. 110 or to prove himself dangerous to society within the meaning of cl. (*f*) of that section. Each case, therefore, has to be scrutinized on its merits, the information upon which proceedings are asked for being scanned and the question whe-

(1) 48 Ind. Cas. 510; 20 Cr. L. J. 30.

ther preventive action is called for or not being considered, due regard being also had to the consequences which in most cases will inevitably follow, namely, that there would be failure to furnish sureties. If such proceedings appear to be necessary in view of the exigencies of any particular case, evidence of general repute which is bound to be affected in a large measure by the very fact of the person proceeded against being a member of a criminal tribe, should be, if at all, acted upon with great caution and scrutiny.

The proceedings in the present case alleged that the petitioners are by habit dacoits, house-breakers and thieves and associate themselves for the purpose of committing those offences and are so desperate and dangerous as to render their being at large without security hazardous to the community. The two petitioners were registered under s. 4 of the Criminal Tribes Act in December 1924 and the proceedings under s. 110, Cr. P. C., were started in October, 1925. The evidence of general repute that has been adduced against the petitioners is not of much importance, firstly, because they are members of a criminal tribe and secondly because they may have had the same reputation when they were registered under s. 4, and the fact that their reputation continued as before does not show that further preventive action is necessary. The important thing is to see what these two persons may have done after such registration. On this point the evidence is singularly weak. As against the petitioner Badu Mir there is only the fact that in February 1925 his name was mentioned in the First Information in connection with a dacoity, in which it was alleged that he was recognized as one of the culprits. He was not, however, sent up for trial in that case. As regards Tear Bap *alias* Asraf Khan he appears to have been implicated by evidence of doubtful value in a dacoity which took place in March, 1925. This man at the time of his arrest appears to have had a *dao* in his hand, and taking the worst view of the evidence, was about to commit an assault on the Sub-Inspector when he was on the point of arresting him. It is hard to say that these materials are sufficient to bind down the two petitioners when they are already registered members of a criminal tribe.

We accordingly make the Rule absolute. The order passed under s. 118, Cr. P. C., against the two petitioners is discharged.

A. N. A. *Rule made absolute.*

OUDH CHIEF COURT.

CRIMINAL REVISION NO. 50 OF 1925.

May 25, 1926.

Present:—Mr. Justice Raza.

EKADASHI AND OTHERS—ACCUSED—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 147—Unlawful assembly—14 out of 17 members acquitted for want of identification—Other men, whether members of unlawful assembly—Omission to state common object in charge, effect of.

The mere fact that 14 out of 17 men charged with being members of an unlawful assembly are acquitted as they were not satisfactorily identified does not vitiate the conviction of the others for being members of an unlawful assembly. [p. 236, col. 1.]

The omission to state the common object in the charge does not vitiate a conviction if there is evidence on record to show it. [*ibid.*]

Application for revision of an order of the Sessions Judge, Lucknow, dated the 22nd April, 1926, dismissing that of the Special Magistrate, First Class, dated the 8th March, 1926.

Messrs. *R. F. Bahadurji* and *H. C. Dutt*, for the Applicants.

The Government Advocate, for the Opposite Party.

JUDGMENT.—This is an application in revision against an order of the learned Sessions Judge, Lucknow, dated the 22nd April 1926.

The dispute in this case relates to some trees in a grove called Imambagh in village Kakauli. The disturbance occurred over the matter of gathering fruits of seven mango trees in the said grove. Mirza Abid Husain had a 6 annas odd share in the village and Imdad is his *zilladar*. Ekadashi is a *thekadar* from the other co-sharers of the village. It has been found that the *zilladar* went to the grove taking some *sipahis* and labourers with him to gather the fruits which were to be divided rateably between the co-sharers. His labourers were unarmed and no aggressive intention could be inferred from what he did on that occasion. He and his men commenced the work of gathering the fruits before Ekadashi and his party arrived at the spot. What he did on that occasion

was resented by Ekadashi and his men. Ekadashi went to the place with a considerable following and many of them were armed with *lathis*. He went there with the purpose of restraining the *zilladar* from giving effect to his rights, or of interfering in some way with him in his exercise of them. The *zilladar* insisted on his rights and was thereupon attacked with his party by a number of men who had come with Ekadashi. The *zilladar's* party was badly beaten. The blow which Ekadashi received was struck in self-defence. On these findings the learned Sessions Judge was of opinion that Ekadashi and his party had committed the offence of rioting.

The learned Sessions Judge acquitted 14 men on the ground that they were not satisfactorily identified. He, however, convicted and punished the remaining 3 men, namely, Ekadashi, Chet Ram and Hanoman. The present application for revision has been filed on behalf of these very men.

In my opinion there is no force in this revision application. On the facts as found by the learned Sessions Judge, I am of opinion that Ekadashi and the men of his party were or became members of an unlawful assembly and committed the offence of rioting. The applicants' learned Counsel contends that when 14 men were acquitted by the learned Sessions Judge, there could be no unlawful assembly and so the applicants should be acquitted. I am not prepared to accept that contention. The mere fact that the men who have been acquitted were given the benefit of doubt as they were not satisfactorily identified does not establish that Ekadashi had only two men with him at the time of the occurrence. The fact is that his party was a party of many men and all of them became members of an unlawful assembly as held by the learned Sessions Judge. It is also contended that the common object was not mentioned in the charge. I have examined the charge. It is not, of course, happily worded, but it appears to be sufficient for the purpose of this case. It should be borne in mind that omission to state the common object in the charge does not vitiate a conviction if there is evidence on record to show it. So far as I see the charge is satisfactorily made out against the applicants and they were rightly convicted and punished under s. 147, Indian Penal Code. I do not think that the sentences are excessive under the circumstances of the case.

Hence I reject this application.

G. H. *Application rejected.*

A. N. A.

CALCUTTA HIGH COURT.

ADMITTED CRIMINAL APPEALS Nos. 293, 356 AND 357 OF 1926.

August 17, 1926.

Present:—Justice Sir George Claus Rankin, Kt., and Mr. Justice Duval.

BASANTA KUMAR GOSSAIN—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 107, 366—Kidnapping—Abetment, what constitutes—Jury, verdict of, based on speculation—Appellate Court's power to set aside verdict.

An Appellate Court is entitled to set aside the verdict of a Jury where their inference is a matter of speculation and there is not sufficient evidence to support their conclusion. [p. 238, col. 1.]

In the penal law of India there is no such category as an accessory after the fact. [p. 237, col. 2.]

The evidence against the accused in connection with a charge under s. 366, Penal Code, was to the following effect:—*B* and his wife *L* lived in Malda District. *B* who was at Dinajpore came back to Malda and told his wife that he had got work at Dinajpore and wanted to take her with him to cook for him and in that way induced her to leave Malda for Dinajpore. When they got to the station they were met by *S* and went to the house of *K*. When *L* enquired why she was brought there she was told by *K* that *B* had sold her to *S* for Rs. 150 and that *S* would make her happy. *S* was also said to have asked her to come and live with him:

Held, that upon this evidence the question which the Jury had to answer was whether the offence of the husband under s. 366 was abetted by *S* and *K* under s. 107, Penal Code, and not whether *S* had made immoral proposals to her or that *K* was a brothel keeper, and there being no evidence of such abetment the verdict of the Jury convicting *S* and *K* could not be upheld. [p. 238, col. 1.]

Criminal appeals against an order of the Sessions Judge, Dinajpur, dated the 22nd April 1926.

Babus *Jatis Chundar Guha*, *Sajani Kant Nag* and *Suresh Chandra Talukdar*, for the Appellant in Appeals Nos. 356 and 357 of 1926.

Babu *Debendra Narayan Bhattacharyya*, for the Respondent.

JUDGMENT.

Rankin, J.—These are three appeals by three persons in connection with a charge under s. 366, Indian Penal Code. The appellant in Appeal No. 293 is Basanta Kumar

Gossain who is the husband of the woman Lachhmi who is said to have been abducted with intent that she might be compelled or with the knowledge that it was likely that she might be compelled to marry a person or in order that she might be forced or seduced to illict intercours. The appellant in Appeal No. 355 is a woman named Kumud Baisnabi who lives in Dinajpore and the appellant in Appeal No. 357 is a man called Surendra Saha. It appears that Basanta and his wife Lachhmi live in the Maldah District and the case against the appellants is shortly this, that Basanta having been at Dinajpore came back to the Maldah District where his wife was and told her that he had got work at Dinajpore and wanted to take her with him to cook for him and in that way induced her to leave Maldah for Dinajpore on the 26th October 1925 arriving at Dinajpore on the 27th. The case is that, when they got to the station, they were met by Surendra and they all went to the house of Kumud the other appellant and, when Lachhmi got there, she enquired why she was brought to such a house and where her husband had found work. She was told by Kumud that her husband had sold her to Surendra for Rs. 150 and that Surendra would give her presents and make her happy. Surendra is said also to have told her that and to have asked her to come and live with him on that footing. This is a case in which the question arises whether there was more than a scintilla of evidence to go to the Jury on certain questions of fact. The learned Judge stated that he thought the case against Kumud and Surendra to be exceedingly weak and, in his charge, he told the Jury very broadly that he thought that the evidence was entirely insufficient; and the way he put the case to the Jury was roughly this: He says that, in the first place, there are a good many things to be said by way of discount of Lachhmi's evidence. It seems that she had given false evidence in a Court of law before; it seems that she got into trouble as regards seeing a certain man during her husband's absence. She says that she met and recognized Surendra at the station; but that is extremely doubtful. When she was found crying outside Surendra's house by the constables she told the story which she tells now more or less and the learned Judge left the case to the Jury upon this basis that, if the Jury were satisfied to believe every thing that Lachhmi said then the question arose for their consideration whether they might not infer from what she said that before her husband had gone back to the Maldah District from Dinajpore he had made an arrangement with Kumud and Surendra for the sale of his wife to Surendra—an arrangement under which they must have known that the wife could not be induced to come to Dinajpore except by deceitful means. The learned Judge did his best to dissuade the Jury from going to such an extreme as that; but in spite of what he said the Jury apparently took the view and convicted all the three appellants—the husband, Kumud and Surendra.

Now, it has been very clearly stated before us by Mr. Bhattacharjee who appears for the Crown that the Criminal Act under s. 366, Indian Penal Code, was committed in the Maldah District at the time when the husband and the wife left that District to go by train to Dinajpore. He concedes also that in our law there is no such category as accessory after the fact. Consequently he says that it was open to the Jury to conclude that, before the husband went back to Maldah to bring his wife, Kumud and Surendra had agreed with him that he would get his wife away by deceitful means in order that she might be sold to Surendra. To my mind, that is going a very long way as an inference of fact and, in my judgment, this case is one in which the correct view to take is that, on the evidence, there is a scintilla of evidence and no more to that effect. It has to be remembered at first that everything depends upon believing to the last letter every word that Lachhmi said. What does then Lachhmi say? She says. "We reached Dinajpore just before day light. There a Hindu Bhadraloke met us and put me in a female waiting room. From there he took me to Kumud Baisnabi's house where we stayed once before in connection with the case. My husband came with us.....My husband, Suren and Kumud Baisnabi were the three people there at the time besides myself. Kumud Baisnabi mentioned Suren's name. That was the man who met us at the station and took us off the train. I then asked Kumud where my husband had got work and where was he now. She said he had no work and no lodging but that I had been brought for my advantage. She said

'you will be happy and you are a lucky woman'." She said then that "the man who took you off the train whose name is Suren has bought you for Rs. 150. She promised me that he would give me money and ornaments and settle property on me. Then Suren spoke to me and promised me all sorts of thing. My husband also tried to make me agree to the proposal. I said what have I done wrong that you should sell me. He said this is my will and you must do whatever I will tell you I protested. I asked him if he was leaving me for ever and he said yes and I asked him to take me before the Magistrate." Upon that evidence, the question is not merely whether the Jury were satisfied that Surendra made immoral proposal to the woman at Dinajpore or whether the Jury were satisfied that Kumud was a woman who kept a house of a disorderly and disreputable character but the question which the Jury had to answer was whether it was shown that the offence of the husband under s. 366, Indian Penal Code, was abetted by Surendra and Kumud under s. 107, IndianPenal Code; and the only way in which that can be made out is by holding upon the girl's evidence which I have read that there is sufficient proof that before the husband left Dinajpore for the Maldah District he had a bargain with these people to that effect, that they knew that the girl could not be brought to Dinajpore except by deceitful means and that, therefore, they abetted the offence under s. 366. On the whole, I am of opinion that this case comes under the class of cases in which the Court is entitled to say that that inference by the Jury is a matter of speculation and that there is no sufficient evidence to entitle the Jury so to hold. For that reason, it appears to me that the appeals of Kumud and Surendra must be allowed and their canvictions must be set aside altogether. If they are in Jail, they must be released at once. If they are on bail, their bail bonds will be cancelled.

With regard to the husband Basanta, nothing in this case leads me to suppose that the Jury were wrong in their view of his conduct. The learned Judge has sentenced him to five years' rigorous imprisonment and, in my opinion, that is not at all too severe a sentence. The evidence against him appears to me to be such that the Jury having accepted it no Court could possibly set aside their verdict. I see no error or unfairness in the charge so far as he is concerned. His appeal, therefore, must be dismissed.

Duval, J.—I agree.

A. N. A. *Appeals Nos. 356 and 357 allowed: Appeal No. 293 dismissed.*

OUDH CHIEF COURT.

CRIMINAL APPEAL No. 290 OF 1926.

August 5, 1926.

Present:—Sir Louis Stuart, KT., Chief Judge.

DAULAT NAI AND OTHERS—ACCUSED—APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (XLV of 1860), ss. 147, 149, 325, 395—Communal riot—Common object to hurt Hindus and rob their shops and houses—Persons joining disturbance, whether guilty both of rioting and dacoity—Sentence—Religious disturbance—Riot and dacoity—Indignation against outrages upon sacred places—Leniency in sentence—Guiding principles.

Where it is established that the common object of certain Muhammadan rioters was both to hurt any member of the Hindu community whom they might happen to find and to rob the shops and houses of the Hindus, any person who is proved to have taken a part in the disturbance is guilty not only of the offence of rioting but also of the offence of dacoity. [p. 239, col. 2.]

In awarding sentence in a case of riot and dacoity committed while the accused were smarting with indignation against the outrages upon their sacred places every allowance should be made for their feelings and a comparative leniency shown, though they must be punished adequately, it being also taken into consideration that the persons injured in the riot and robbed had no share in desecrating the holy places and were made to suffer for the sins of others. [p. 240, col. 1.]

Criminal appeal from an order of the Additional Sessions Judge, Bahraich, dated the 12th July, 1926.

Mr. *H. Husain*, for the Appellants.

Mr. *G. H. Thomas*, Government Advocate, for the Respondent.

JUDGMENT.—On the 28th September 1925 a serious disturbance occurred in the town of Jarwal in the Bahraich District, in the course of which many persons were alleged to have been seriously injured. Amongst them one man Ram Bhajan succumbed to his injuries. It is further alleged that in the course of this disturbance property was taken from several persons. Forty-five men were committed to Sessions on charges of riot, dacoity and grievous hurt. An Additional Sessions and Subordinate Judge was appointed to hear and decide the case. He commenced the

hearing on the 6th April 1926 and delivered judgment on the 12th July, 1926. He convicted 22 persons of those committed to Sessions and acquitted 23. Out of the 22 persons convicted 17 have appealed, the remaining five persons convicted have not appealed. At the outset I put on record my appreciation of the care and intelligence shown by the learned Sessions Judge in the trial of the case and in the judgment which he delivered. He has given such a clear account of the origin of the disturbance and the various stages therein that it is not necessary for me to state more than the substance of the case. Put shortly, the disturbance originated through the ill-feelings between the Hindus and the Muhammadans of Jarwal. On the 25th September 1925 it was discovered that certain persons had desecrated holy places of the Muhammadans in an outrageous manner. The carcass of a pig had been thrown inside a small mosque near the school building in a suburb of Jarwal called *katra* and the severed head of a pig had been thrown into a mosque in Jarwal. The indignation amongst the members of the Muhammadan community in the town was, as was natural, considerable. Reports were made to the Police and to the higher authorities. The authorities took immediate steps to inquire into the matter. On the 26th September 1925 a Muhammadan Deputy Magistrate and a Muhammadan Circle Inspector of the Police arrived at Jarwal and took precautions to prevent disturbances. On the 28th September 1925 the District Magistrate of the Bahraich District, a Muhammadan gentleman, arrived at Jarwal and did his best to assuage the feelings of the Muhammadans but unfortunately, as soon as he left, a riot broke out. In the hearing of the case it was alleged for the prosecution that the Muhammadans of Jarwal were the aggressors in this riot. For the defence it was alleged that the Hindus were the aggressors. The learned Sessions Judge has found, after a careful examination of the evidence, that the Muhammadans were the aggressors. Undoubtedly they had had considerable provocation in the desecration of their holy places, but the fact remains that members of the Muhammadans community in large numbers made a deliberate attack upon Hindus in Jarwal and in certain instances committed decoity. I agree with the view taken by the learned Sessions Judge that it is established that the common object of the rioters was both to hurt any member of the Hindu community whom they might happen to find and to rob the shops and houses of the Hindus, and that in these circumstances any person who is proved to have taken a part in the disturbance must be found guilty not only of the offence of riot but of the offence of dacoity. The main consideration in this appeal is whether the learned Sessions Judge has in each individual case decided correctly upon the facts, that each appellant has been proved to have taken part in the riot. It is a matter of very great difficulty in cases of this class to sift the evidence, and to ascertain what evidence is true and what evidence is false. The learned Sessions Judge has, however, overcome these difficulties in the admirable judgment which he has recorded. I have had the advantage of being taken through the record by the learned Counsel for the appellants who has devoted a great deal of care to the preparation of his brief, and who has discussed the evidence intelligently and well. He has not, however, been able to shake the conclusions of the learned Sessions Judge in the case of any person who has been convicted. The task of an Appellate Court in a case like this is very greatly lightened when the sifting of the truth from the falsehood has been done with the care and intelligence which has distinguished the work in the present case. The learned Counsel for the appellants has been forestalled in his task by the Sessions Judge himself, who has examined very carefully and very closely every piece of evidence against every individual accused person; and, where he has found it very unconvincing or where there was any room for a reasonable doubt as to the complicity of the person accused, he has taken the proper course of acquitting that person. But in the end he found 22 persons guilty out of 45, 17 of whom have appealed. It is unnecessary for me to go into the details of each individual conviction because I have only to say that I am in complete agreement with what the learned Sessions Judge has said in each particular case and I find that all the appellants have been rightly found guilty.

I now come to the question of sentence. The awarding of sentences in a case such as this is also no easy task. It must be remembered very clearly that the men who

have been convicted were smarting with indignation against the outrages upon their sacred places, and every allowance should be made for their feelings. If they had committed a riot such as this without provocation they would have deserved very severe sentences. But it is a good argument for a comparative leniency in sentencing that they were suffering from what I have no hesitation in describing as a gross outrage on their religious feelings. At the same time they must be punished adequately. There is absolutely nothing to show that any of the unfortunate persons, who were injured in this riot and whose property was robbed, had any share or part in the placing of the dead pigs in the holy places. There is every reason to suppose that they were made to suffer for the sins of others, and this fact must be taken into consideration. The learned Sessions Judge appears to me to have awarded the sentences with the same intelligence that he has shown in sifting the evidence. To the persons we took a more serious part in the affair he has given total sentences of two years' rigorous imprisonment and to those whose participation was of less degree he has given lighter sentences ranging from 6 months to one month; and only amounting to nominal sentences in the case of the five persons who have not appealed. I see no reason to interfere with these sentences which appear to me to fulfil all the conditions which should be fulfilled in a case of this nature. They are sufficiently severe to show the inhabitants of Jarwal and of other places that conduct such as is shown by the Muhammadans of Jarwal will not be tolerated and will be met with sufficient punishment. But there has been a considerable reduction of sentence to mark that the Muhammadans had received severe provocation. I dismiss these appeals.

Appeals dismissed.

G. H.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 870 OF 1926.

November 8, 1926.

Present:—Mr. Justice Agha Haidar.

YARU—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal trial—Evidence—Document prepared by Police during investigation, admissibility of.

A document which is not evidence does not become so by being formally proved and exhibited in the case. A document prepared by the Police during the investigation cannot, therefore, be treated as evidence even though formally proved.

Criminal appeal from an order of the Sessions Judge, Shahpur at Sargodha, dated the 24th June, 1926.

JUDGMENT.—Yaru has been convicted and sentenced to a term of five years' rigorous imprisonment including three months' solitary confinement and action has also been taken by the learned Sessions Judge under s. 565, Cr. P. C. He has appealed from Jail. The charge against him was under s. 379 read with s. 75, Indian Penal Code. He had three previous convictions against him, the last conviction being dated the 28th August 1919, under s. 379/75 for three years' rigorous imprisonment. I noticed on going through the record that certain documents which the Police—in this case a Head Constable—had prepared during the course of investigation have been treated as evidence in that the witnesses who have come forward on behalf of the prosecution have been formally called upon to prove them by the identification of the signatures which they affixed upon them. This course was entirely erroneous and illegal and the learned Sessions Judge was mistaken in considering that those documents were evidence and could be looked into after they had been formally proved by witnesses. A document which is not evidence does not become so by being formally proved and exhibited in the case. One of these documents, Exhibit P B is specially referred to in the order of the Sessions Judge. The procedure was to say the least of it, extremely irregular and it is to be hoped that it would not be repeated.

However, I have gone through the record carefully and, in my opinion, after eliminating these documents from consideration the guilt of the accused is proved by the prosecution witnesses and all the links in the chain of evidence against him are complete. Accused is an old man, and, according to the record, not in robust health but having regard to his previous history it cannot be said that the sentence passed upon him is unduly severe. The appeal is dismissed.

A. N. A.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS APPEAL No. 307 OF 1924 AND CIVIL MISCELLANEOUS APPEAL No. 91 OF 1925.

September 23, 1926.

Present:—Mr. Justice Devadoss and Mr. Justice Sundaram Chetty.

RACHAMADUGU RANGIAH AND OTHERS —RESPONDENTS—APPELLANTS

versus

Y. V. APPAJI RAO—PETITIONER—RESPONDENT.

Provincial Insolvency Act (V of 1920), ss. 28 (7), 53—Alienation by insolvent less than two years before date of presentation of petition and more than two years from date of adjudication, application to set aside, whether maintainable—Construction of Statutes.

An application to set aside a voluntary transfer lies under s. 53 of the Provincial Insolvency Act, even if the transfer is more than two years from the date of the order of adjudication if it is within two years from the date of the presentation of the petition on which the adjudication was made. [p. 241, col. 1.]

Section 53 is based upon the corresponding provision in the English Act and in interpreting s. 53, the Court may take into consideration what the Law of Bankruptcy is under the English Act. Section 28 (7) controls the provisions of and must be held to govern s. 53. [p. 241, col. 2.]

Sankaranarayana Aiyar v. *Alagiri Aiyar* (1), *Rakhal Chandra Purkait* v. *Sudhindra Nath Bose* (3) and *Sheo Nath Singh* v. *Munshi Ram* (4) followed.

Nagindas v. *Gordhandas* (5) and *Ghulam Muhammad* v. *Panna Ram* (6), not followed.

Ex parte Clough, In re Reis (2), distinguished.

Courts should construe the provisions of legislative enactments in such a way as not to impute inconsistency to the Legislature. [p. 242, col. 1.]

Appeals against the orders of the District Court, Anantapur, in I. A. No. 271 of 1921, in I. P. No. 3 of 1920.

Mr. *K. Krishnaswami Iyengar*, for the Appellants.

Mr. *B. Somayya*, for the Respondent.

JUDGMENT.—These appeals are against the order of the District Judge of Anantapur annulling certain transfers of property under s. 53 of the Provincial Insolvency Act. It is contended for the appellants that s. 53 of the Act does not apply as the transfers of property were more than two years before the date of the adjudication of the insolvent. It is urged that the expression "is adjudged insolvent" can only refer to the adjudication of the insolvent and not to the date of th presentation of the petition on which the adjudication was made. The question for determination is, does an application to set aside a voluntary transfer lie under s. 53 of the Provincial Insolvency Act if the transfer is more than two years from the date of the order of adjudication but within two years from the date of the presentation of the petition on which the adjudication was made. This point is covered by authority so far as our High Court is concerned.

In *Sankaranarayana Iyer* v. *Alagiri Iyer* (1) Oldfield and Sadasiva Iyer, JJ., considered this point at considerable length and came to the conclusion that the adjudication referred to in s. 36 of the old Act had to be treated as made on the date of the presentation of the petition on which the insolvent was adjudicated. It is contended that this decision is wrong and is opposed to the view of the Bombay and Lahore High Courts. The argument is that under s. 53 the period of two years is to be calculated backwards from the date of adjudication as the clause "if the transferor is adjudged insolvent within two years after the date of the transfer" can only mean the date of the order of adjudication and not the date of the presentation of the petition on which the adjudication is made, that cl. (7) of s. 28 cannot govern the plain meaning of the words in s. 53, and if the Legislature intended that the two years should be calculated backwards from the date of the presentation of the petition, the expression "is adjudged insolvent" would not have been used, for in s. 54 it is clearly enacted that the transfer should be within three months of the petition presented for adjudication. No doubt there is a difference between the wording of s. 53 and that of s. 54. In s. 53 the clause is "any transfer..... .....shall if the transferor is adjudged insolvent within two years after the date of the transfer, be voidable.....". Section 54 is "every transfer of property.....shall, if such person is adjudged insolvent on a petition presented within three months after the date thereof, be deemed fraudulent and void.....". If s. 53 stood alone, it might be contended with some show of reason that the expression "is adjudged insolvent," can only mean the order of adjudication, but in cl. (7) of s. 28 it is enacted that "an order of adjudication shall relate back to and take effect from, the date of the presentation of the petition on which it is made." The question, is, does cl. (7) of s. 28 govern s. 53? It is suggested that cl. (7) is not an independ-

(1) 49 Ind. Cas. 283; 35 M. L. J. 296; (1918) M. W. N. 487; 24 M. L. T. 149; 8 L. W. 281

ent section as in the English Act and, therefore, it cannot be held to govern the provisions of s. 53. This argument is fallacious. Section 28 lays down the consequences that flow from the order of adjudication. It is a general provision relating to adjudication and the consequences of adjudication. Section 28 (7) is, therefore, a general clause which applies to all dealings by with the insolvent unless any particular dealing is expressly exempted from its operation.

Section 53 is based upon the corresponding provision in the English Act and in interpreting s. 53 the Court must take into consideration what the Law of Bankruptcy is under the English Act. Reliance is placed upon a judgment of Wright, J., in *Ex parte, Clough, In re, Reis* (2) where the learned Judge observed that there was a difference between the meaning of the words "adjudicated bankrupt" and the meaning of the words "becoming bankrupt." The expression in s. 47 of the English Act is "if the settlor become bankrupt." It was contended before Wright, J., that the expression "becomes bankrupt" should be held to mean "being adjudged bankrupt" and he construed the expression "becoming bankrupt" as insolvency commencing at the time of the first of the acts of bankruptcy proved to have been committed within three months next preceding the date of the presentation of the bankruptcy petition. He did not accept the contention that the expression "adjudged bankrupt" meant only the actual adjudication of the insolvent. He only stated the contention that there was a distinction between the use of the words "adjudged bankrupt" and the use of the words "becoming bankrupt." There is no reason for overlooking the clear provision in s. 28 (7) in considering the other sections of the Act. It is a well-known canon of construction that the Courts should construe the provisions of legislative enactments in such a way as not to impute inconsistency to the Legislature. Where the provisions are reconcilable the Courts should try to reconcile. They should not attach importance to a single phrase or clause in one section and overlook the clear provision in other sections which are of a general character. There are exceptions to the general provision in s. 28, cl. (7). Section 51 which reads as follows, "where execution of a decree has issued against the property of a debtor, no person shall be entitled to the benefit of the execution against the Receiver except in respect of assets realised in the course of the execution by sale or otherwise before the date of the admission of the petition," contains an Exception to s. 28 (7). A creditor or a debtor may present a petition for adjudication of the debtor. The petition may be returned for correction and sometime may elapse before the petition is admitted by the Court. In such cases the date from which the time should be reckoned is not the date of the admission of the petition but that of the presentation thereof. Under s. 55 which relates to *bona fide* transaction, a transaction would be held to be good if it takes place before the date of the order of adjudication and if the person with whom such transaction takes place had not, at the time, notice of the insolvency petition by or against the debtor. If the argument of appellants is to hold good a voluntary transfer made a day before the presentation of the insolvency petition cannot be attacked if the Court does not adjudicate the insolvent for two years. The policy and the scope of the Insolvency Act is to prevent fraudulent preference and fraudulent transfers and the period mentioned in s. 53 has nothing to do with the delay of the Court in passing the order of adjudication. The matter might be taken as far as the Privy Council and if it takes five years for the matter to be finally settled by the Privy Council, could it be said that a voluntary transfer made a few days before the presentation of the insolvency petition could not be attacked by reason of the adjudication not having been made for a considerable time owing perhaps to causes over which the Court might not have control? Oldfield and Sadasiva Iyer, JJ., have given cogent reasons for their conclusion that cl. (6) of s. 16 of the old Act corresponding to cl. (7) of s. 28 of the present Act controls the provisions of s. 36 of the old Act corresponding to s. 53 of the present Act. It is unnecessary to consider all the arguments advanced in that case.

In *Rakhal Chandra Purkait* v. *Sudhindra Nath Bose* (3) a Bench of the Calcutta High Court held that the provisions of s. 36 of the Provincial Insolvency Act were to be

(2) (1904) 1 K. B. 451.

(3) 52 Ind. Cas. 747; 46 C. 991; 24 C. W. N. 172.

read with s. 16 (6) of the Act. In *Sheo Nath Singh* v. *Munshi Ram* (4) a Bench of the Allahabad High Court concurred in the view taken by this Court in *Sankaranarayana Aiyar* v. *Alagiri Aiyar* (1). The learned Judges observed:

".....the view which we take is the view which was always taken from the earliest days in the administration of the Bankruptcy Law for reasons inherent in the policy of the Bankruptcy Law, some of which are contained in the judgment of the Madras High Court."

The case that is strongly relied upon by Mr. K. S. Krishnaswami Iyengar is *Nagindas* v. *Gordhandas* (5). In that case Sir Norman Macleod, C. J., and Coyajee, J., held that the point of time from which the two years' period mentioned in s. 53 was to be calculated was the date on which the order of adjudication was made and not the date of the presentation of the petition. With very great respect we dissent from the view of the two learned Judges. They do not discuss at length the point whether cl. (7) of s. 28 controls the provisions of s. 53. They refer to the judgment of Wright, J., in *Ex parte Clough, In re Reis* (2) and after referring to corresponding provisions in the English Act and the Provincial Insolvency Act conclude at page 738 "it cannot be denied that a person is adjudged insolvent on the day on which the order is made, though the effect of the order on the insolvent's property relates back to an earlier date," and observe:

"Therefore, in our opinion, if it had been intended that a voluntary transfer should be voidable if made within two years from the date of the presentation of the petition on which the adjudication order is made, there was no reason why that should not have been as clearly stated in s. 53 as it is in s. 54, and we do not think that the doctrine of 'relation back' can be imported into the former section, so as to make it appear that the point of time from which the two years are to be calculated, is the date of the presentation of the petition, and not the date when the transferor is adjudged insolvent."

We fail to see why the general provision of law in cl. (7) of s. 28 should not be read into s. 53 unless the clear terms of s. 53 are against reading that clause into it. It cannot be suggested that the Indian Legislature made a departure from the English Law in enacting s 53. Under the English Law the relation back is to the available acts of bankruptcy or the first of the available acts of bankruptcy. Section 43 of the English Act enacts:

"The bankruptcy of a debtor, whether the same takes place on the debtor's own petition or upon that of a creditor or creditors, shall be deemed to have relation back to, and to commence at, the time of the act of bankruptcy being committed on which a receiving order is made against him, or, if the bankrupt is proved to have committed more acts of bankruptcy than one, to have relation back to, and to commence at, the time of the first of the acts of bankruptcy proved to have been committed by the bankrupt within three months next preceding the date of the presentation of the bankruptcy petition."

The Indian Legislature in enacting cl. (7) of s. 28 lays down that the order of adjudication shall relate back to and take effect from the date of the presentation of the petition on which it is made and not from the act of bankruptcy on which a receiving order is made or, if there are more acts of bankruptcy than one, the first of the acts of bankruptcy committed within three months next preceding the date of the bankruptcy petition.

In *Ghulam Muhammad* v. *Panna Ram* (6), the Lahore High Court takes the same view as that of the Bombay High Court in *Nagindas* v. *Gordhandas* (5). The learned Judges refer to the decision in *Sankaranarayana Aiyar* v. *Alagiri Aiyar* (1) and comment on the argument of Sadasiva Iyer J., and observe that his argument merely amounts to an admission that the framers of the Act committed a mistake and an explanation how the mistake came to be committed. The view of the two learned Judges is opposed to the view of the Calcutta High Court, *Rakhal Chandra Purkait* v. *Sudhindra Nath Bose* (3) and to the decision in *Sankaranarayana Aiyar* v *Alagiri Aiyar* (1) With due respect we must say that no convincing argument has been referred to in their judgment as to why s. 16 (6) of the old Act should not be read into s. 36 of the Act. In *Madhu Sardar* v. *Khitish Chandra Banerjee* (7) Mookerjee and Beachcroft, JJ.,

(4) 55 Ind. Cas. 941; 42 A. 433; 2 U. P. L. R. (A.) 122; 18 A. L. J. 449.

(5) 88 Ind. Cas. 941; 44 B. 730; 27 Bom. L. R. 967; A. I. R. 1925 Bom. 480.

(6) 72 Ind. Cas. 433; A. I. R. 1924 Lah. 374.

(7) 30 Ind. Cas. 82; 42 C. 289.

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held that s. 34 of the Provincial Insolvency Act restricts the operation of cl. (6) of s. 16 and the provision in s. 34 with regard to the assets realised in execution must be held to be an exception to the general rule laid down in s. 16 (6) of the old Act. On a careful consideration of the relevant sections of the Act and the case-law on the point we have no hesitation in holding that the period of two years should be calculated backwards from the date of the presentation of the petition on which the adjudication is made.

As to the merits in Appeal No. 307 the learned District Judge has discussed the evidence in paragraphs 19 and 20 of his judgment. We have been taken through the evidence on this point and we see no reason to differ from the finding of the learned Judge that the purchase under Ex. III was not made in good faith by the appellants. One of the items of consideration for the sale was an amount due under a mortgage bond. The mortgage-bond has not been produced and there is no reliable evidence that the insolvent undertook to pay the appellants a sum of money which a third person owed him on a mortgage. Neither the original mortgage-deed said to have been executed by the insolvent nor a registration copy of it was produced by the appellants. We, therefore, accept the finding of the learned Judge on this point without hesitation.

In C. M. A. No. 91 of 1925 the 7th respondent is the first appellant. The learned Judge discusses his case in para. 22 of the judgment. Though the appellant is a stranger to the insolvent, yet it is remarkable that he did not care to make any enquiry as to why the insolvent was executing a number of documents on the same day alienating his property to several persons. There is one circumstance which ought to be taken into consideration; on the day on which this document was executed, a suit was filed and an injunction was obtained against the insolvent alienating any of his properties. No doubt the appellant says she was not aware of the issue of an injunction. But it is very unlikely that when a man in well to do circumstances alienates his immoveable property in favour of several persons and executed on the same day a number of documents, the persons who are parties to the documents would not have taken the trouble to find out why he was doing so. If a person abstains from enquiry he cannot be said to have acted *bona fide*. We, therefore, agree with the learned District Judge in holding that the transaction evidenced by Ex. XIX is void against the Official Receiver.

The 28th respondent is the legal representative of the 4th respondent in the lower Court. The sale in his favour is evidenced by Ex. XVI. One of the items of consideration is the amount due on a promissory note. The promissory note has not been produced and the evidence as to the passing of consideration for Ex. XVI is unsatisfactory. The evidence of P. W. Nos. 6 and 7 is not of much use. No account books are produced, and it is strange that a family which has considerable money dealing should not have kept accounts to evidence their transactions. It is unnecessary to discuss the evidence in detail. We have no hesitation in holding that the transaction is void as against the Official Receiver.

In the result the appeals fail and are dismissed with costs.

V. N. V. *Appeals dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL CIVIL No. 66 OF 1925.

May 17, 1926.

Present :—Sir Lancelot Sanderson, KT., Chief Justice, and Justice Sir George Claus Rankin, KT.

MEGHRAJ KANYALAL—PLAINTIFF—APPELLANT

versus

DURGA SAHAI BULDEODAS—DEFENDANTS—RESPONDENTS.

Contract—Stipulation that vernacular terms added by buyer shall be null and void—Addition of such terms, effect of—Contract, whether valid—Shipments, contracts by, nature of.

A printed contract provided that "anything besides plain signature written by the buyer in any native language on the contract shall be null and void and shall not be construed in any way as part of the terms and conditions of the contract." The buyer before signing the contract wrote a description of the goods and time of shipment, etc., in vernacular which did not tally with the English version. The trial Court held that though the vernacular terms cannot be imported into the agreement, yet it can be looked into for the purpose of showing that the parties had not agreed to the terms as written in English;

Held, that the vernacular terms were null and

void and could not be looked into at all, and the parties must be held to have entered into the contract contained in the English terms. [p. 252, col. 2.]

A contract for the sale of five cases to be shipped in July, August and September provided that if in any one month one package be shipped in excess of that month's instalments the buyers agreed to accept such one package so shipped in excess as aforesaid along with the instalment of that month. The sellers tendered two cases of the August shipment and three of the September shipment:

Held, that each shipment must be treated as a separate contract and the defendants cannot be called upon to accept more than two cases of September shipment. [p. 254, col. 1.]

Appeal against the following judgment of Mr. Justice Buckland, dated the 24th April, 1925:—

This is a suit to recover Rs. 6,520 as damages for breach of contract by reason of the defendant firm's failure to pay for and take delivery of certain goods under an alleged contract dated the 1st April 1920. The case on behalf of the plaintiff firm is that on the day in question a contract was entered into at Calcutta between themselves and the defendant firm whereby the plaintiff firm agreed to sell and the defendant firm agreed to buy five cases of Hasel Poplins, quality No. 10859, to be shipped in July/August/September 1920 at Rs. 1-4 per yard on the terms and conditions of a document annexed to the plaint. The plaintiffs allege that the goods were duly shipped and appropriated against the contract and that notice of arrival and appropriation was given to the defendant firm. There were disputes as regards the quality, finish and shade of the goods. The matter was referred to the Bengal Chamber of Commerce, which made an award on these points. The plaintiffs say that the time for taking delivery, which should have been as regards five cases the 5th January 1921 and as regards two cases the 9th February 1921, was extended to the 31st May 1922 by mutual consent, but the defendants failed to take delivery and the goods were re-sold against the defendants by public auction, resulting in a loss of Rs. 4,496-9-6, which with accrued interest makes up the amount claimed in the suit.

I do not intend to refer in detail to all the defences taken in the written statement, for the case turns in effect entirely on one. It will suffice, therefore, if I state the issues in which they are embodied:—

1. Was there a binding agreement between the parties, and if so, what were the terms thereof as to shipment and sample?

2. Were the goods of proper shipment within the terms of the contract. If nay, did the defendants waive the fulfilment of such terms by (*a*) submitting to the arbitration of the Bengal Chamber of Commerce, (*b*) letters dated the 16th February, 8th April and 20th May 1921 and (*c*) not objecting, as provided by cl. 4 of the alleged contract?

3. Was the due date extended to the 21st May 1922, or at all?

4. Is the award of the Bengal Chamber of Commerce binding on the defendants?

5. Limitation.

6. Damages.

I should explain that as the system of pleading in this country does not admit of a reply, it was only after issues had been submitted that the plaintiff firm had the opportunity of raising the case of waiver, which is to be found in the latter part of the second issue.

The whole case depends in the first instance on the first issue, and if that issue is decided in favour of the defendant firm, it is unnecessary that I should go any further. The case depends less upon the oral evidence than upon the state in which I find the original contract in suit. But before I refer to the latter I will briefly say what the evidence on either side is as to the way in which the alleged contract came about.

Only one witness on this point was called on behalf of the plaintiff; that is Sewrattan Mandra who said that he was a partner in the plaintiff firm. He gave his age as 24. He may be 24, although he certainly, in my opinion, does not exceed that age. It is a matter not entirely unimportant because as the contract was made 5 years ago, he must at the most have been a boy of 19 years of age when the transaction was entered into. Both his father Mathura Das and his uncle Ram Chunder Mandra were alive and were participating in the business, and it is certainly open to comment that this lad should have been left in sole charge of and conducted all that had to be done, if his story is true, in connection with this transaction when his elders were also engaged in the business.

The broker in the transaction, who has given evidence on behalf of the defendant firm, was Gonesh Prosad Khettry, and Sewrattan says that the contract was brought to him by the broker. When the contract was brought to him, it had been signed by the defendant firm

The contract itself is on a printed form, which occupies about three quarters of the whole sheet. Then follow 3 typewritten lines containing particulars of the goods ordered, as alleged in the plaint. Then follow 4 lines in vernacular writing comprising, among other things, the signature of the defendant firm. Then follow 4½ lines in pencil, which purport to be and in fact are a translation differing, but very slightly, from the official translation of the preceding lines in vernacular manuscript. Sewrattan says that when the broker brought the contract the vernacular writing was upon it. He says that the broker said nothing to him about the defendants requiring any other term or that the defendants would not agree if terms other than those which appear in typewriting were not accepted. It is the plaintiff's case that the translation which is to be found at the foot of the document in pencil was written at a considerable interval thereafter—when it is of no consequence.

The defendants' version of the matter, which is supported both by Sukumull Khettry and by the broker Gonesh Prosad Khettry, is that negotiations, in the first instance, took place between the parties with reference to a sample and the defendant Sukumull said that he would buy, but he wanted among other terms July/August shipment. The broker says that he informed Mathuradas, who agreed to the terms which the defendants desired. Then the contract was prepared, as I understand, in the office of the plaintiff firm, with the typewritten portion filled in. The broker brought this to the defendant Sukumull, who protested that 2 months had been given as the dates of shipment, that there was no mention of the finish and that there was nothing about 90 days, which he required. The document remained one day with Sukumull and on the following day, according to the evidence both of Sukumull and the broker, they took it to the plaintiff firm, where they saw Mathura Das, who agreed. Sukumull then signed the document and inserted his terms in the vernacular. A translation of the vernacular portion so written as given by the Official Translator, is as follows:—

"Durga Sahay Buldeodas. Tussore cases 5 (five cases). Inches 27 28; *Than* of 40 yards. Quality No. 10859 at 1-4 per yard. Shipmens July-August. Godown due 90 days from the arrival of the goods in godown. Finish as given by us." The document then remained with the plaintiff firm.

It is common ground as regards these two versions that when the signed document was handed to the plaintiff firm, the vernacular writing was there. It is also common ground that the English translation was written subsequently to the vernacular writing and signature. I draw attention to this, because from the point of view of either side, what is written in English in pencil at the foot is not a part of the contract as signed by the defendant firm and does not profess to be more than a translation written by some third person at the request of one or other of the parties, after an interval of time, prolonged according to one version and very brief according to the other.

The importance of the addition in manuscript in the vernacular lies in the fact that cl. 21 of the printed conditions of the contract is as follows:

"Anything besides plain signature written by the buyers in any native language on the contract shall be null and void and shall not be construed in any way as a part of the terms and conditions of this contract."

That clause clearly precludes the vernacular portion being a part of the agreement. To that extent the plaintiff is right in saying that he is not bound by it. But cl. 21 does not preclude the vernacular writing serving any purpose whatsoever, and, in my opinion, it is not open to the plaintiff, as was the case, according to the evidence of Sewrattan, to take no notice of it whatever aud to make no enquiry. The vernacular words were intended to and do modify the preceding terms in typewriting Their effect is that of a counter-proposal made by the defendant firm. Sewrattan seems to have imagined that cl. 21 made it unnecessary for him to do more than satisfy himself that the contract had been signed and that he could ignore the rest.

I cannot take that view The signature undoubtedly was there and the plaintiff is entitled to say that anything in vernacular is not to be construed as a part of the contract or agreement between the parties. He is not, however, in my opinion, entitled to say that cl. 21 prevents anything written in the vernacular being looked at for the purpose of showing that the parties had not agreed. "Anything besides plain signature written

by the buyers in any native language," though it cannot be imported into the agreement, may yet import disagreement. It would reduce the matter to an absurdity if the buyer were to write against his signature in the vernacular "I do not agree," but the sellers were entitled to say that by the signature alone he had agreed to the contract. That represents the position in which, in my judgment, the parties found themselves when this document came into the possession of Sewrattan with the defendant's signature and the vernacular writing. To such extent, the vernacular writing does not offend against condition 21.

Sukumull, as I have already observed, says that Mathuradas agreed to these particular terms and, therefore, he signed his firm's name and wrote these words in the vernacular. It is possible, therefore, if that is so, that there was an oral consensus between the parties, but cl. 21 would prevent what appears on the document in the vernacular being treated as a part of the written contract representing that which had been orally agreed.

Hence, the conclusion at which I have arrived is that there was no binding agreement on the terms stated by Sewrattan and to be found in the plaint. Both the vernacular words themselves and the oral evidence exclude any agreement having been arrived at exclusively on the basis of this document without the vernacular writing. On the other hand, I cannot come to the conclusion that there was an agreement in writing on the terms deposed to by Sukumull and specified in the vernacular writing, for condition 21 is in the way and prevents such a finding. But as such an agreement is not that sued upon and it is not the defendants who are setting up any contract upon which they sue, there is no need to consider this aspect of the matter.

Had I to decide between the two versions given both by the plaintiff and the defendant, as to which was the true one, regarding the way in which the contract was made, I should accept the evidence given on behalf of the defendants in preference to the unsupported evidence of Sewrattan, for I find it very difficult to believe that he exclusively was engaged with this matter and that this document was put away and no notice was taken of the vernacular writing in the way in which he said. His uncle Ramchunder is alive and in Calcutta, but he has not given any evidence in the case.

On the other hand, the defendant Sukumull is supported by the broker Gonesh Prosad Khettry, and I see no reason for disbelieving him, particularly as their evidence is corroborated by the vernacular writing on the document itself, whereas the simple story told by Sewrattan that the paper was immediately put away is not supported in any way. But it is unnecessary that I should definitely come to any finding with regard to that for it is on the document itself for reasons already given, that I come to the conclusion that there was no binding agreement between the parties. That being so, it is not necessary further to consider the case as to shipment in detail, though I have little doubt that the explanation of all that subsequently took place is that each side was proceeding as though the terms were those which they respectively thought had been agreed.

The suit must be dismissed with costs on scale No. 2.

Messrs. *Langford James* and *D. N. Basu*, for the Appellants.

Messrs *N. N. Sircar*, *A. K. Roy* and *Arun Sen*, for the Respondents

JUDGMENT.

Sanderson, C. J.—(*May 17, 1926.*)—This is an appeal by the plaintiffs against the judgment of my learned brother Mr. Justice Buckland, which was delivered on the 24th of April 1925.

The suit was brought to recover Rs. 6,520 which was made up of Rs. 4,496 the principal sum claimed with interest amounting to Rs. 2,023.

The plaintiffs alleged that a contract had been made between him and the defendant firm on the 1st of April, 1920, whereby the plaintiff agreed to sell to the defendant firm five cases of Hazel Popline of a certain quality to be shipped in July, August and September 1920 at Rs. 1-4-0 per yard on the terms and conditions which are set out at the end of the contract. The plaintiffs further alleged that the defendants raised certain objections as to the quality, finish and shades but that upon a reference to the Tribunal of Arbitration it was ordered that the goods which had been offered to the defendants were a fair tender and it was further ordered that the defendants should take delivery in terms of the contract. The defendants, however

failed to take delivery and it is alleged that time was extended till the 31st of May 1922 but that even then the defendants failed to take delivery and the plaintiffs re-sold the goods and the sum claimed was claimed as the difference on the re-sale or as damages.

The defendants by their written statement admitted that they entered into a contract on the 1st day of April 1920 but they alleged that the shipment was to be in July and August instead of July, August and September as alleged by the plaintiffs, and they further alleged as follows: "at the time of signing the said contract, the defendants entered in Hindi at the foot of the English writings in the printed contract form the terms and conditions regarding quality, number of cases, size, finish and delivered due dates which were as follows." A translation in English was set out in the written statement. The translation made by the Official Translator is set out in the learned Judge's judgment and is as follows: "Durga Sahay Baldeo Das, Tussore cases 5 (five cases. Inches 27·28; *Than* of 40 yards, quality No. 10859 at 1-4 per yard. Shipment July, August. Godown due 90 days from the arrival of goods in godown. Finish as given by us." In short, the defendants' case was that there was a concluded contract, which included the writing in the vernacular language which was agreed to by the plaintiffs and by which the plaintiffs were bound.

Issues were settled and they are to be found at page 13 of the paper book. The main issue was the first one "Was there a binding agreement between the parties and if so, what were the terms thereof as to shipment and sample."

The learned Judge found that there was no concluded agreement between the parties but that the terms contained in the vernacular writing in the contract constituted a counter-proposal by the defendants.

The plaintiffs-appellants relied upon the terms of the contract which were in English.

The description of the goods was as follows: "5 (five) cases each to contain 30 pieces 27"-28". About 40 yards. Quality No. 10859. Hazel Popline. Shipment July August-September 1920 at Re. 1-4 per yard (rupee one annas four only per yard), and all instructions as advised by mail."

Clause 21 provided as follows: "Anything besides plain signature written by the buyers in any native language on the contract shall be null and void and shall not be construed in any way as a part of the terms and conditions of this contract."

Sewrattan, a member of the plaintiff firm, gave evidence and stated that he could not read the Hindi writing and I think that according to the evidence on both sides it appeared that the members of the plaintiff firm could not read this particular Hindiscript. It was suggested on behalf of the defendants that the form of the contract, which was a printed form, with the description of the goods in type, was for the use of European firms. There is no evidence as to that, and in this case the form was used by two Indian firms—the plaintiffs and the defendants.

It was argued on behalf of the plaintiffs that no evidence was admissible except the contract in suit, that cl. 21 excluded any modification which might be contained in the Hindi writing, and that if it was admissible to look at the verbal evidence given on behalf of the defendants such evidence was not reliable and, in short, the contract between the parties was as alleged by the plaintiffs.

The defendants' case was that the contract, as originally proposed by the plaintiffs and contained in the printed and type written terms, was modified as stated in the Hindi writing and they relied on the verbal evidence of the witnesses who were called on their behalf.

If the evidence of the defendants' witnesses were to be accepted, the contract in the printed and type written English terms would not represent the real contract, which was, in fact, arrived at, and this might be a good ground for rectification of the contract. In that case it would not be right to allow the plaintiffs' claim for damages for breach of contract to succeed in this suit.

The first question, therefore, is whether the defendants' case should be accepted.

The learned Judge said that he did not come to any definite finding as to the facts, as he decided the case upon the document itself, but he stated that if he had to decide he would accept the defendants' case in preference to that of the plaintiffs.

The learned Judge in his judgment did

not deal with the evidence in detail, but he mentioned two grounds: first, he found it difficult to believe that Sewrattan was exclusively engaged in the matter and that the document was put away without any notice being taken of the vernacular writing. Secondly, because Sukumull was supported by the broker, Ganesh Prosad Khettry, and he saw no reason for disbelieving him.

It is necessary, therefore, for this Court to consider the evidence more closely than was done by the learned Judge.

The defendants' case was as follows: That towards the end of March, 1920, the broker Gonesh Prosad Khettry, went to Sukumull Khettry the manager of the defendants' firm and showed him a sample and offered him some Hazel Popline at Re. 1-4-0. Shipment for July, August and September was proposed by Gonesh Prosad Khettry.

Sukumull is alleged to have said he would make a *soudah* but on the terms that shipment should be July August godown due 90 days, and finish should be according to sample, which he would supply.

Gonesh Prosad Khettry is alleged to have taken the sample supplied by Sukumull away with him, saying he would propose these terms to the plaintiffs.

Gonesh Prosad Khettry, called on behalf of the defendants, said that he went to the plaintiffs' firm and saw Mathura Das, a member of the firm who is now dead, and told him of Sukumull's terms. Gonesh Prosad Khettry alleged that Mathura Das in reply said "I shall supply with this finish and shall give goods of these shipments."

I understand that to mean that Mathura Das agreed to the terms stated by Sukumull to Gonesh Prosad Khettry, and repeated by Gonesh Prosad Khettry to Mathura Das, one of which was that the shipment was to be July/August. This conversation is supposed to have taken place before the printed form of contract was prepared by the plaintiffs.

If then Mathura Das had agreed to the defendants' terms, as stated by Gonesh Prosad Khettry, especially as to the shipment being July/August, I do not understand why the clause, inserted in the form to be signed by the defendants, was for shipment in September as well as for July/August.

Again I do not understand why the broker, Gonesh Prosad Khettry, took the form as filled up by the plaintiffs to the defendants without any protest, knowing as he must have done, if his evidence were true, that it was not in accordance with the terms as to shipment stated by the defendants and to which Mathura Das is supposed to have agreed.

In my opinion this evidence is unreliable, and I am unable to accept it.

The defendants' case as to the subsequent events was that when Gonesh Prosad Khettry took the form of contract to Sukumull he would not sign it in its then condition.

His objections were that the shipment was July, August and September, instead of July-August, and the contract made no mention of "finish," or the godown due date.

According to the defendants' evidence it was arranged that Sukumull should go with Gonesh Prosad Khettry to the plaintiffs' place of business and accordingly he and Gonesh Prosad Khettry went there on the 2nd April. Sukumull is alleged to have seen Mathura Das and to have said to him "I can sign this contract on terms about which I told you through the broker." Mathura Das is alleged to have said, "your terms are acceptable to me, you sign the contract."

It was alleged that thereupon Sukumull signed the contract and added the words in "Murwa" script. Sukumull alleged that Mathura Das said to Gonesh Prosad Khettry "get the contract translated" and that the writing was then translated by a Bengali gentleman at Ganesh's dictation in the presence of Sukumull and Mathura Das.

There appears on the contract some writing in pencil purporting to be a translation in English of the Hindi writing. Gonesh Prosad Khettry's evidence, in my opinion, was to the same effect as that of Sukumull, *viz.*, that the Hindi writing was translated on the occasion of the signing of the contract as alleged by Sukumull.

The evidence of Jogendra Nath Banerji who was called on behalf of the plaintiffs was that he wrote the pencil writing, *viz.*, the translation of the Hindi script at the dictation of a third person. He said that the translation of the Hindi writing was not made until the papers had to be sent to the Attorney's office.

The learned Judge dealing with this part of the case said as follows: "It is common ground as regards these two versions that when the signed document was handed to the plaintiff firm, the vernacular writing was there. It is also common ground that the English translation was written subsequently to the vernacular writing and signature. I draw attention to this, because from the point of view of either side, what is written in English in pencil at the foot is not a part of the contract as signed by the defendant firm and does not profess to be more than a translation written by some third person at the request of one or other of the parties, after an interval of time, prolonged according to one version and very brief according to the other.

With respect to the learned Judge, I think that he did not appreciate the materiality of this evidence. I do not think it is correct to say that "from the point of view of either side, what is written in English in pencil at the foot is not a part of the contract as signed by the defendant firm."

It was the defendants' case that the pencil writing in English was part of the contract.

The following questions and answers in the cross-examination of "Sewarattan," the member of the plaintiff firm, will make that clear.

"*Q.* Do you appreciate the importance of that pencil writing?

"*Ans.* No.

"*Q.* Do you not appreciate that my clients are saying that pencil writing is part of the contract?

"*Ans.* No, it is not.

"*Q.* Do not you understand that that is what my clients, rightly or wrongly are saying, and that it was put there at or about the time the agreement was entered into?

"*Ans.* They are at liberty to make any suggestion they like; I cannot stop them from doing so"?

The allegation, made on behalf of the defendants, obviously was that the translation in English in the pencil writing was made at the time the agreement was entered into, and that, therefore, the plaintiffs knew the terms inserted by Sukumull and accepted them.

In my judgment the discrepancy between the plaintiffs' evidence and the defendants' evidence in this respect cannot be disposed of by saying "that it does not profess to be more than a translation written by some third person at the request of one or other of the parties after an interval of time, prolonged according to one version and very brief according to the other."

In my judgment there was a clear conflict of evidence on this point: the defendants were alleging that the translation was made at the time the agreement was entered into *viz.*, 2nd April 1920 and in the presence of Sukumull and Mathuradas and that it was part of the contract.

On the other hand the plaintiffs' evidence was to the effect that the defendants' evidence was entirely untrue, that J. N. Banerjee, who undoubtedly wrote the English translation at the dictation of a third person, was not in the employment of the plaintiffs until the following year, and that he did not make the translation until the papers had to be sent to the attorneys by reason of the dispute which had arisen in respect of the contract.

The two stories are entirely irreconcilable and the question is which should be believed.

I have no doubt that in this respect the defendants' evidence should not be accepted.

There is no reason why the evidence of J. N. Banerjee should not be accepted and it was not seriously argued in the Court of Appeal that his evidence should not be accepted.

The result, therefore, is that in two respects at least I find that the evidence of Sukumull and the broker is untrue.

Further I am of opinion that the story told by Sukumull and the broker is improbable.

I think there is considerable force in Mr. Langford James' comment that if the defendants' story were true, the object of Sukumull could have been easily effected by filling up the blank in cl. 2, and inserting therein "90" which was the usual time in such a contract and which had been omitted by mistake by striking out "September" in the shipment clause and if necessary adding "finish according to cutting" "and by Mathura Das initialling such alterations."

Instead of that being done, the English terms were left unaltered, and terms were added in Hindi which the plaintiffs could not read. He argued that the addition as to

"finish" was not really necessary, and that the only real variation between the printed and typed terms and the Hindi terms was as to the shipment in September; for the 90 days were agreed and the typed terms included the phrase "all instructions as ordered by mail."

The copy indent which was not included in the paper-book, but which was put in by consent at the hearing of the appeal, showed that the indent sent to England contained a clause as to finish as follows: "More glazed finish is required as advised in our letter of 1st April, 1920" and it was the plaintiffs' case that the sample given by the defendants to the plaintiffs was sent by them to England. It was urged that there was really nothing between the parties except the term "September" shipment.

If the Hindi writing was really intended to be a material variation of the contract, as contained in the English terms, I do not understand why Mathura Das was not asked to put his name thereto, for the purpose of evidencing the contract. That is what would have been done, I should have thought, in the ordinary course between business men.

The result, therefore, is that I cannot accept the defendants' evidence as to the alleged completed contract including the Hindi terms, for the reasons already given.

I have still to deal with the evidence of Sewrattan. The effect of his evidence was that he "gave the contract". It was handed to the broker, in order that he might get it signed by the defendants. That the broker took it, and brought it back, and said the other party had signed it.

I have no doubt that Sewrattan was speaking the truth when he said he could not read the vernacular writing; his script was "Maheysari." The Hindi writing on the contract was alleged by Sukumull to be "Murwa" script. Sewrattan said that the Hindi writing was on the contract when it was returned but that he did not understand that it contained anything more than the signature of the purchaser.

He alleged he did not pay any attention to the writing in Hindi except that he was informed by the broker that the contract was signed, because one of the terms of the contract was that anything written in Hindi save and except the signature was not to be accepted by the sellers. The above is his own version of the effect of the 21s clause of the contract.

In do not find this account to be so improbable that it must be rejected.

The other ground on which the learned Judge relied was that he could not believe that Sewrattan was exclusively engaged in this transaction.

I do not find the same difficulty.

It was proved that a knowledge of English necessary for the import business, was which Sewrattan had, and that neither Sewrattan's father nor his uncle knew the English language. Sewrattan was 19 years old at the time and when he was cross-examined on the point and asked whether he had carried through the contract by himself without assistance, he had no hesitation in replying in the affirmative and he said "you can refer to the books of account and other papers which contain my signature." This was no doubt said with a view to showing that he was in the habit of transacting such business himself.

The learned Advocate, who was cross-examining, did not accept this challenge and did not refer to the books.

It was not suggested that the contract in question was out of the ordinary course of business; indeed the evidence shows that there were other contracts of a similar nature.

In 1921 it was Sewrattan who signed the contract of employment of J. N. Banerjee.

I do not consider that any sufficient reasons have been given for rejecting the evidence of Sewrattan, which as far as one can judge from reading it, seems to be that of a straightforward and truthful witness.

Upon consideration of the evidence I am of opinion that the defendants' case, *viz.*, that there was a completed contract made on the 2nd April 1920, upon the terms contained in the Hindi writing on the contract should not be accepted.

I am satisfied that the contract was returned to the plaintiffs by the broker, as described by Sewrattan.

There is no doubt that the contract, when so returned, bore upon it the Hindi writing.

This writing consists in the first place of the signature of Durga Sahai Buldeodas, then follow the Hindi words the translation of which is set out in the learned Judge's judgment.

It remains to consider what is the proper construction of the document.

The learned Judge, as already stated, held that "the vernacular words were intended to and do modify the preceding terms in typewriting Their effect is that of a counter-proposal made by the defendant firm" and he decided the case on that footing.

In my judgment that is just the kind of thing, at which cl. 21 of the contract was aimed, and which it was intended to prevent.

There is no doubt that Sukumull signed the contract in the name of the defendants.

He alleged that he signed it on the 2nd April. The putting of the signature to the paper was undoubtedly intended as a signing of the contract.

It is clear that Sukumull knew about cl. 21 and the terms thereof.

His evidence on this point was not given satisfactorily.

When he was first asked in cross-examination about the clause he said, "I am not sufficiently conversant with English so as to read the whole of it and I do not know anything about this term"——a very explicit statement.

Yet on being further pressed, he had to admit that he had been in the habit of entering into contracts in the form of this contract and that "in every contract that clause is to be found" and that he knew that it was in every contract. He went on to say that he knew the clause was in the contract in suit, and so he wrote out his own terms therein.

It must, therefore, be taken that Sukumull had read the terms of the contract including cl. 21 and understood the effect of them.

What then was the effect of his signing the contract?

The learned Advocate for the defendants argued that the signature should not be detached from the endorsement in Hindi and that the construction should be that the defendants were willing to sign in respect of the sale of goods as specified by the defendants.

Again, this seems to me to be just what the terms of cl. 21 were designed to prevent?

I do not intend to express any opinion except so far as the facts of this case are concerned, and my decision is confined to these facts. Where, as in this case, the person signing the name of the defendants, signed it intending to enter into a contract, and for his own convenience or for some other reason, wrote a description of the goods in Hindi which differs from the English description of the goods in the contract. I am of opinion that the terms contained in the Hindi writing must be treated as null and void, and cannot be construed or taken as part of the contract by reason of the provisions of cl. 21.

It is not really necessary to consider the reason why the Hindi writing was put in the contract.

Apparently it is not an uncommon thing for parties to do, otherwise there would be no reason for the existence of cl. 21 in all similar contracts, as stated by Sukumull.

In this case there is really no material difference between the typed description and the Hindi description except that "September" shipment was omitted from the Hindi writing, for as already stated the "finish" was provided for in the phrase "all instructions as advised by 'mail.'"

The reason, therefore, in this case for the addition of the Hindi writing may be that Sukumull may have preferred to have the description in Hindi as well as in English and the omission of 'September' may have been an oversight, as suggested by the learned Advocate for the plaintiffs.

It is, however, unnecessary to speculate as to this.

The conclusion at which I have arrived on the construction of the document is, that the defendants entered into the contract contained in the English terms and that such terms cannot be modified or altered by reason of the addition of the Hindi writing.

Yesterday the learned Advocate, who appeared for the plaintiffs drew our attention to the case of *Gopi Nath Nandy* v. *Nilambar Sita Nath Kundu* which was decided in December 1914 by Sir Lawrence Jenkins and Mr. Justice Woodroffe. The case was not reported. the learned Advocate stated that he had given notice to the defendants that he would mention it. A clause in the contract in that case was in terms very similar to cl. 21 in the contract in this case and was as follows:—

"Anything besides plain signatures written by the buyers in any native language on this contract shall be null and void and shall not be construed in any way as

part of the terms or condition of this contract."

The suit was brought by the plaintiff claiming damages for non-delivery of certain goods. The contract, which was in English, was for 200 tons galvanized corrugated iron sheets. There were written upon the contract in Bengali character above the signature of the plaintiffs' *gomasta* the following words, as translated in English, "we have purchased $37\frac{1}{2}$ tons out of 200 tons July, August shipment. We shall not take more goods."

The defendants relied upon these terms for the purpose of showing that they were not liable to deliver more than $37\frac{1}{2}$ tons. The plaintiffs alleged that the terms added in Bengali were a perjury. The learned Judge who tried the case came to the conclusion that he was unable to hold that what was challenged as a forgery, was a forgery but he gave judgment for the plaintiff in respect of the balance of the contracted amount which was undelivered.

The matter came before the Court of Appeal and I propose to read the learned Chief Justice's judgment which is short and runs thus:—

"The only question that arises on this appeal is whether the contract was for 200 tons or $37\frac{1}{2}$ tons. The contention that it was $37\frac{1}{2}$ tons rests upon something written in a native language on the contract. But by the express agreement of the parties 'anything besides plain signatures written by the buyers in any native language on the contract shall be null and void.' We are, therefore, compelled on the very terms of the contract to disregard the provision written in the vernacular, and it does not appear to be profitable to consider whether it was inserted or not under circumstances of suspicion. On this ground and on this alone we dismiss the appeal with costs."

It is satisfactory to find that the decision of Sir Lawrence Jenkins and Mr. Justice Woodroffe was to the same effect as the conclusion, at which I had arrived without knowing of their decision.

My learned brother and I are of opinion that this case should be disposed of by this Court on the evidence already on the record. We, therefore, propose to hear the arguments of learned Advocates on both sides on the other issues, as hitherto our attention has not been drawn to those issues at all.

Rankin, J.—I agree.

The Court then passed the following judgments on the other points raised in the case.

Sanderson, C. J.—This appeal has been already partly disposed of by a judgment of this Court upon the construction of the contract. The learned Judge who tried the case did not dispose of the other issues. The result of this Court's judgment was that it became necessary for this Court to deal with the other issues and the learned Advocate for the respondents stated the points upon which he intended to rely and the case was argued upon that basis.

The first point was that as regards the two cases Nos. 185 and 186 the suit was barred by the Act of Limitation. The second point was that there was late shipment as regards three cases. The third point was that three out of the five cases were not in accordance with the sample, and the fourth point, which was raised, was with regard to damages.

It was stated by the learned Advocate who appeared for the appellants that the issue that the cases were not in accordance with the sample was not raised at the trial; and accordingly in this Court that point was abandoned.

There remain, therefore, three points which I have mentioned.

There is no doubt that the claim is barred so far as the two cases Nos. 185 and 186 are concerned, unless it can be shown that there was an agreement for extension of time for taking delivery. I will deal in detail with that question at present, but I am of opinion that so far as the contract which is the basis of this suit, namely, No. 228 is concerned the plaintiffs-appellants have not proved that there was an extension of time for taking delivery, and consequently, in my judgment, the suit fails as far as these two cases are concerned.

The suit as regards cases Nos. 233, 234 and 235 is not barred by limitation for the due date was the 9th of February 1921 and the suit was brought on the 10th of January 1924; the point, therefore, which has to be considered in connection with these three cases is the question of late shipment. These three cases were shipped in September. The defendants' case is that under the contract the plaintiffs were bound to tender one case at least of July shipment as the provision of the contract was for the sale of five cases and the shipment was to be in July, August and September.

The learned Advocate argued that as the plaintiff was bound to tender one case of July shipment and as the two cases Nos. 185 and 186 were August shipments, the defendants could not be called upon to take more than two of September shipment. In my judgment that contention is right, unless it can be shown that the plaintiffs' position is saved by cl. 13 of the contract.

Clause 13 of the contract is to this effect: "If in any one month one package be shipped in excess of that month's instalments the buyers agree to accept such one package so shipped in excess as aforesaid along with the instalments of that month. If in any one month one package less than that month's instalments be shipped, the buyers agree to take that instalment less the one package so short shipped as aforesaid."

In my opinion, cl. 13 does not avail the plaintiffs in this case. It is clear that it was the intention of the parties that each instalment should be regarded as a separate contract. That is made plain by the provisions of cl. 18 of the contract. The result, therefore, is that the July, August, and September shipments must be regarded as separate contracts and, as stated already, the September contract, in the events which had happened, could not be for more than two cases. In my opinion, cl. 13 could not be intended to make the buyer take more than the total amount for which he had contracted. The clause must have been intended to arrange for a month's instalment containing a package in excess of the quantity provided by the contract for that particular instalment, the delivery being within the total amount of the contract quantity.

Clause 14 was also relied upon by the learned Advocate for the plaintiffs. I find cl. 14 is difficult to understand. In any event, in my opinion, it is of no avail to the plaintiff. The blank is not filled in; and I am of opinion that this clause as well as the 13th clause must be subject to the implied provision that the buyer is not liable to take delivery of a larger quantity of cases than the total amount provided by the contract. I am, therefore, of opinion that neither the 13th nor the 14th clause is of any avail to the plaintiff in this particular respect.

There is a further question whether it can really be said that cl. 13 applies at all. The contract was for five cases. Clause 13 deals with "packages." Whether it can be said that "packages" are the same as "cases" with regard to the facts of this case is doubtful.

The result as regards this part of the case, in my opinion, therefore, is that the plaintiff is entitled to recover in respect of two cases only of the September shipment.

I have now to deal with the question whether there was an extension of time for delivery. There were other contracts running between the parties for the sale and delivery of goods, and there is no doubt on the evidence that with regard to the other contracts there was an arrangement made on the 7th of February 1921 for an extension of time for taking delivery for two months.

It is further clear upon the evidence that this arrangement did not include the goods which were the subject-matter of contract No. 228. There is a letter of the 23rd of May 1921 from the plaintiffs to the defendants to this effect: "The delivery due date of the goods against your above contracts, which you kept with us on interest, passed on the 7th April last, and in spite of our repeated demands you have not yet succeeded to take delivery of the said goods. We hereby call upon you to take delivery of the above-mentioned goods paying value and interest within three days from date hereof, failing which we shall be compelled to re-sell the said goods on your account and risk without any further notice or reference to you and shall hold you liable for the consequences." The date of the 7th of April in that letter obviously refers to the expiration of the two months' time which had been arranged on the 7th of February and it is clear on the evidence that this did not apply, as I have already said, to this contract No. 228; yet the plaintiffs' letter of the 23rd of May was written on the basis that the arrangement did apply to contract No 228. In this respect, in my opinion, the letter was incorrect.

There was a dispute as to whether the letter of the 26th of May 1921 was sent by the respondents. I think there can be little doubt that it was sent by the respondents and in that letter the respondents stated that "as regards contract No. 228 the matter is still pending for final decision; anyhow we can assure you of our best endeavours to retain our long friendly connection."

The reference to "final decision" takes

one back to the letter of the 8th of April 1921 from the defendants to the plaintiffs. In that letter the defendants said: "*Re*: Contract No. 228-5 C-S popline. Your favour dated 30th ultimo. You are already informed of our placing protest on the award as given by the Bengal Chamber of Commerce.

"We regret we can do nothing in this connection until our case and complaint fully investigated."

It is, therefore, obvious that there was no agreement for extension of time for delivery in respect of the goods—the subject-matter of contract No. 228, up to the end of May 1921.

The question, then, arises: What is the evidence of any agreement after that date? The letters which are set out in the paper-book, dated the 22nd of July 1921, 7th of December 1921, 8th of February 1922 and the 26th of May 1922 were not answered by the defendants. In my judgment, some of those letters are inconsistent with the plaintiffs' case that there had been a specific arrangement for the extension of time for taking delivery down to May 1922. At any rate, those letters do not constitute evidence of any such agreement.

The matter, therefore, rests upon the verbal evidence of Sewrattan; and although I do not intend to make any reflection upon the truth or honesty of Sewrattan, I think his evidence on this point is not sufficient. It is contained in a very few questions and answers which are to be found at pages 34 and 35. I need not set out the evidence in my judgment. The material questions are Nos. 189, 195, 200, 201 and 202. The witness said that his case was that at a date later than May 1921 the defendants promised to take delivery. That is a vague statement. There is no evidence as to the date when or the place where the alleged arrangement was made: nor was it stated who were the persons who made the alleged arrangement. I think that upon this point the evidence of Sewrattan does not go far enough to support the case of the plaintiffs that there was a specific arrangement that the time for taking delivery in respect of the goods under contract No. 228 should be extended till May 1922.

For these reasons, I am of opinion, as already stated, that the alleged agreement for the extension of time for taking delivery has not been proved.

The result, in my judgment, therefore, is that the plaintiff is entitled to recover in respect of two cases of the September shipment only.

The plaint is based upon a re sale and the difference between the amount produced on the re-sale and the amount which would have been realized if the contract had been carried out by the defendants. The re-sale, however, did not take place till the end of May 1922. Having regard to the fact that I have come to the conclusion that there was no agreement for the extension of time for taking delivery, the re-sale which took place in May 1922, cannot be relied upon by the plaintiffs. The plaintiffs, therefore, are relegated to any claim for damages which they can prove against the defendants for the breach of their contract in not taking delivery of the two cases of the September shipment at the time when delivery ought to have been taken. There is no evidence as to the market price of these particular goods at the due date, *viz.*, February 1921 on the record. The parties, however, have agreed that there will be judgment for the plaintiff for Rs. 750 as the amount of damages in respect of the two cases of the September shipment.

The appeal is allowed and there will be a decree entered for the plaintiffs for Rs. 750. The plaintiffs will be entitled to their costs of the suit in the trial Court and in our opinion it was a fit case to be tried by the High Court. The costs will be on Scale No. 2. The plaintiffs appellants will be entitled to recover two-thirds of their taxed costs of the appeal from the defendants.

Rankin, J.—I entirely agree and have nothing to add.

A. N. A. *Appeal allowed.*

OUDH CHIEF COURT.

SECOND CIVIL APPEALS NOS. 349 AND 350 OF 1925.

April 20, 1926.

Present:—Mr. Justice Raza.

Syed MUSTAFA HUSAIN AND OTHERS—DEFENDANTS—APPELLANTS

versus

Musammat SAIDUL NISAN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Acquiescence, estoppel by, principles relating to—

Wilful wrong-doer, whether can plead acquiescence—Mere failure to object, whether amounts to acquiescence—Appeals—Appellant, duty of, to show lower Court's judgment to be wrong.

In appeals the burden of showing that the judgment appealed from is wrong lies upon the appellant and if all he can show is nicely balanced calculations which lead to equal possibility of the judgment on either the one side or the other being right, he has not succeeded. [p. 256, col. 2.]

Nabakishore Mandal v. *Upendrakishore Mandal* (2), relied on.

The mere fact that no objection was raised by a person when another built upon his land and that there was delay in enforcing his rights does not amount to acquiescence. [p. 257, col. 1.]

The doctrine of acquiescence cannot be invoked by a person who was not under the *bona fide* belief that he was acting within his rights. [p. 257, col. 2.]

Rafiq Husain v. *Bishnath Prasad* (3), *Wilmott* v. *Barber* (4) and *Jai Narain* v. *Jafar Beg* (5), relied on.

Second appeal against a decree of the Subordinate Judge, Lucknow, dated the 30th March, 1925, in Appeal No. 26/233 of 1924, affirming that of the Munsif, Lucknow, dated the 29th September, 1923.

Messrs. *Radha Krishna* and *Wasi Hasan*, for the Appellants.

Mr. *Hakimuddin* for Mr. *M. Wasim*, for the Respondents.

JUDGMENT.—These appeals arise out of a suit brought by the plaintiffs for possession of a strip of land in village Nagram, District Lucknow by demolition of a wall and a *pushta* (buttress) and the closing of some doors and *parnalas*. The plaintiff No. 1 is the proprietor of plot No. 749. The plaintiff No. 2 is the mortgagee with possession of that plot. The defendants are owners of plot No. 748 which adjoins plot No. 749. These plots are situated in Nagram Mahal *Taraf Dakhin*.

The defendants constructed a house on plot No. 748 about 9 years ago. They made a *pushta* attached to the western wall of the house and opened two doors and seven *parnalas* which throw water towards the western side of the house.

The plaintiffs brought the present suit alleging that the defendants encroached upon their land No. 749 that the western wall and also the *pushta* stand on their land and that they (defendants were wrong in opening doors and *parnalas* upon their (plaintiffs') land.

The claim was resisted by the defendants. They denied the alleged encroachment and pleaded that the wall and the *pustha* both stood on their land. They alleged further that they had deliberately left a portion of their land beyond their western wall to justify them in opening the doors and constructing the *pushta* in question. They also raised the plea of acquiescence.

The first Court decreed the plaintiffs' claim about the closing of the "*parnalas*" and issued an injunction "restraining the defendants from having ingress and egress through the two doors in the western wall of their house." Though the first Court held that the defendants had constructed the *pushta* in question by encroaching upon the plaintiffs' land the defendants were not directed to demolish the *pushta*, on the ground that the injured party had slept over the matter for a long time. It should be noted that the first Court had found that the plaintiffs had not really acquiesced in the construction as alleged by the defendants.

Both the parties appealed and their appeals were disposed of by the learned Subordinate Judge of Mohanlalganj on the 16th March, 1925. The plaintiffs' appeal was allowed to this extent that the defendants were directed to demolish the *pushta* in question and the defendants' appeal was dismissed entirely. The defendants have now come to this Court in second appeal.

In my opinion there is no force in these appeals. The finding of the lower Courts, that the defendants have encroached upon the plaintiffs' land by constructing the *pushta* in question, must be accepted in second appeal. The learned Subordinate Judge has very carefully discussed the whole evidence on this part of the case. He has carefully considered all the questions having a bearing on the point under consideration.

The appellants' learned Counsel has attempted to show that the finding of the lower Courts is erroneous. So far as I see the finding is not open to any objection and is really unassailable. Even an erroneous decision of fact is not a ground for interference in second appeal [*Ahmad Husain* v. *Umrao Fatima* (1).] It should also be borne in mind that in appeals the burden of showing, that the judgment appealed from is wrong, lies upon the appellant. If all he can show is nicely balanced calculations, which lead to equal possibility of the judgment on either the one side or the other being right, he has not succeeded. This was clearly pointed out by their Lordships of the Privy Council

(1) 64 Ind. Cas. 223; 24 O. C. 221.

in the case of *Nabakishore Mandal* v. *Upendra Kishore Mandal* (2). The defendants were wrong in constructing the *pushta* in question on the plaintiffs' land. They were also wrong in opening doors and *parnalas* upon the plaintiffs' land. They have now to thank themselves for the consequences.

The plea of acquiescence has not been accepted by both the lower Courts. I am not prepared to interfere with the finding on that point also. The defendants have raised the plea of acquiescence simply on the ground that the plaintiff No. 1 raised no objection when the building was constructed and that there was long delay on her part in enforcing her rights, if any, in respect of the land in dispute. So far as I see this does not establish acquiescence. It was never the defendants' case that they had acted in the *bona fide* belief that they were acting within their rights.

The appellants' learned Counsel has referred to the case of *Rafiq Husain* v. *Bishnath Prasad* (3) in support of his argument. In that case there was reliable evidence to show that the defendants had all along a firm conviction that the strip of land in dispute was theirs', and they had on the strength of that conviction started building a structure on the entire land in suit including the piece which was afterwards found to be the plaintiffs' property. I do not find and have not been referred to any evidence to that effect in this case. That case must be distinguished from the present case. Each case must be dealt with on its own merits and governed by its own circumstances. The law on the subject of equitable estoppel has been expounded in the case of *Wilmott* v. *Barber* (4). In dealing with the subject of acquiescence, Fry, J., observed as follows at page 105* of the report:

"It has been said that the acquiescence which will deprive a man of his legal rights must amount to fraud, and in my view that is an abbreviated statement of a very true proposition. A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights. What, then, are the elements or requisites necessary to constitute fraud of that description? In the first place the plaintiff, (*i. e.*, the party pleading acquiescence) must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know of it he is in the same position as the plaintiff, and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights. Fourthly, the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights. Lastly, the defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right. Where all these elements exist, there is fraud of such a nature as will entitle the Court to restrain the possessor of the legal right from exercising it, but, in my judgment, nothing short of this will do." [See *Jai Narain* v. *Jafar Beg* (5)].

Applying these principles to the case before me I am not prepared to hold that the plea of acquiescence is made out. No other point was pressed before me in the course of arguments. In my opinion the judgment of the learned Subordinate Judge is quite correct and must be upheld.

The result is that the appeals fail and must be dismissed I dismiss the appeals with costs. The decrees of the lower Appellate Court are confirmed in all respects.

A. N. A. *Appeals dismissed.*

(2) 65 Ind. Cas. 305; 20 A. L. J. 22; (1922) M. W. N. 95; 26 C. W. N. 322; 35 C. L. J. 116; 42 M. L. J. 253; 24 Bom. L. R. 346; 15 L. W. 417; 30 M. L. T. 234; 3 P. L. T. 311; A. I. R. 1922 P. C. 39 (P. C.).

(3) 84 Ind. Cas. 511; 28 O. C. 114; 10 O. & A. L. 848; 11 O. L. J. 677; A. I. R. 1925 Oudh 258; 1 O. W. N. 418.

(4) (1880) 15 Ch. D. 96; 43 L. T. 95; 28 W. R. 911.

(5) 92 Ind. Cas. 1017; 24 A. L. J. 355 at p. 357; A. I. R. 1926 All. 324; 48 A. 353.

*Page of (1880) 15 Ch. D.—[*Ed.*]

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 2385 TO 2390 OF 1922.

June 4, 1926.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Mr. Justice B. B. Ghose.

SARODA PROSAD PAKRASI AND OTHERS —APPELLANTS

versus

UMASANKAR SANYAL AND OTHERS— RESPONDENTS.

Bengal Regulation XLIV of 1793, ss. 4, 5—Patni—*Fixity of rent, presumption of*—*Tenure created after Permanent Settlement*—*Revenue sale*—*Contract as to fixity of rent, whether cancelled*—*No enhancement for long series of years, inference from*—*C. P. C. (Act V of 1908), O. VII, rr. 14, 18*—*Documents not included in list*—*Admission in evidence*—*Discretion of trial Court*—*Appellate Court when interferes*—*Principles relating to admission of such documents.*

The grant of a *patni* connotes that the rent is fixed. [p. 263, col. 1.]

Nirod Chandra v. *Harihar* (3), distinguished.

Where for a long series of years during which the value of the property has increased manifold no attempt was made to claim any enhancement of rent, a legitimate inference may be made that the original contract was that the rent should be fixed for ever. [p. 264, col 1.]

The Appellate Court will not interfere with the discretion exercised by the trial Court in not admitting in evidence documents not entered in the list of documents filed under O VII, r. 14, C. P. C., unless it is shown that the trial Court was entirely wrong in exercising its discretion. The mere fact that the Appellate Court would have admitted the document is not a sufficient ground for admitting such documents in appeal. [p. 259, col 2.]

Per *Sanderson, C. J.*—The fact that a *talukdar* had to pay enhanced rent by reason of the provisions of s 5 of Bengal Regulation XLIV of 1793 does not show conclusively that the rent of a tenure was not fixed. [p. 260, col. 2.]

Per *B. B. Ghose, J.*—Where a tenure has not been held from the time of the Permanent Settlement the landlord is *prima facie* entitled to enhancement of rent. [p. 262, col. 1.]

A contract as to fixity of rent relating to a tenure created after the Permanent Settlement is not absolutely cancelled by a revenue sale, under the provisions of s. 5 of Bengal Regulation XLIV of 1793. The *talukdar* and *ryots* remain in all respects as before except that they become liable to a certain limited increase of rent according to the established usages and rates. [p. 262, col. 2.]

Where there is no reasonable ground for suspicion that a document might have been fabricated after the filing of the plaint such as documents obtained from public offices or copies obtained from Court and with regard to which the other side might not be prejudiced as being taken by surprise or not having any opportunity of adducing rebutting evidence, the Court may properly, in the exercise of its sound discretion, receive such documents in evidence and then decide as to their probative value giving every opportunity to the other side to rebut the effect of those documents if they were believed. [p. 264, cols. 1 & 2.]

Rules of procedure are not made for the purpose of hindering justice. [p. 264, cols. 1 & 2.]

Wide discretion has been given to the Court with regard to matters of reception of evidence although the documents have not been entered in the list of documents filed by the parties, and this discretion should be exercised for the furtherance of justice. [p. 264, col. 2.]

Appeals against the decrees of the Additional District Judge, Pabna and Bogra, dated the 28th July, 1922, reversing those of the Subordinate Judge, First Court, Pabna, dated the 30th June, 1920.

Mr. *Ram Chunder Mazumdar* and Babu *Kali Kinkar Chakravarti*, for the Appellants

Mr *Sarat Chandra Roy Chowdhury* and Babu *Bireswar Bagchi*, for the Respondents.

JUDGMENT.

Sanderson, C. J.—In this matter there are six appeals arising in six rent suits, which were disposed of in the first Court and in the lower Appellate Court by one judgment in each Court.

The plaintiffs are three batches of co-sharer-landlords and the tenants-defendants are the same in each suit. The remaining co-sharer-landlords are the *pro forma* defendants.

The plaintiffs claimed rent and a right to enhance the rent in each case.

In the trial Court the plaintiffs succeeded and the learned Subordinate Judge of Pabna decreed the suits and assessed the rent at double the existing rent in the respective cases.

The tenants-defendants appealed to the Additional District Judge and the learned Judge came to the conclusion that the rent was not enhanceable but that it was fixed in perpetuity and consequently he allowed the appeals. The plaintiffs-landlords appealed to this Court.

The first point to which it is necessary for me to refer, is the argument which was addressed by the learned Advocate for the respondents, that the plaintiffs were not entitled to maintain the suits by reason of the provisions of s. 188 of the Bengal Tenancy Act. I see no reason to differ from the conclusion at which the learned District Judge arrived in that respect having regard to the terms of the *kabuliyat*, which is printed at page 30 of the paper-book containing the additional papers, and having regard to the other facts of the case. I need say no more than that I agree with the conclusions of the learned District Judge and the learned Subordinate Judge,

namely, that the plaintiffs were entitled to maintain the suits.

The next point relates to the rejection of a certain document which was described by the plaintiffs as the "*likhan*" in respect of the *pattani majkuri taluk* granted by the Maharajadhiraj Ram Krishna Roy Bahadur to be called for from witness." The name of the witness given, was Khirod Lall Pakrasi.

The learned Subordinate Judge did not allow that document to be put in evidence. The learned District Judge stated that if he had been trying the suits as a Court of first instance he might have been inclined to admit the document, but that he was unable to say that the learned Subordinate Judge in the circumstances, had exercised his discretion wrongly. The document in question was alleged to be a certified copy of a document dated the 11th *Chaitra* 1201 *B. S.* (corresponding to 24th March, 1795,) and it was alleged that by that document the Maharajadhiraj Ram Krishna Roy had created a non-permanent *majkuri taluk* at a rent of Rs. 4.891 in favour of Ganga Gobinda Sanyal, who was alleged to be the predecessor-in-title of the defendants in these suits.

On the question whether the rent is liable to be enhanced it cannot be doubted that that document was material and the question, which arises in connection with that document is whether by reason of the provisions of O. VII, rr. 14 and 18 of the C. P. C., the document is admissible or not.

Rule 14 is as follows:—

(1) "Where a plaintiff sues upon a document in his possession or power, he shall produce it in Court when the plaint is presented, and shall at the same time deliver the document or a copy thereof to be filed with the plaint."

The part of the rule does not apply to this case. Sub-r. (2) provides:—

"Where he relies on any other documents (whether in his possession or power or not) as evidence in support of his claim, he shall enter such documents in a list to be added or annexed to the plaint."

The provision is specific, and it is clear that the plaintiffs did not enter this particular document in a list which was added or annexed to the plaint.

The result, therefore, was that O. VII, r. 18 came into operation.

That rule provides as follows:

"A document which ought to be produced in Court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint, and which is not produced or entered accordingly, shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit."

In this case, therefore, inasmuch as the plaintiffs did not comply with the provisions of O. VII, r. 14, the document in question could not be admitted unless the plaintiffs succeeded in obtaining the leave of the learned Subordinate Judge.

The question in this appeal with regard to that matter is, in my opinion, whether the learned Subordinate Judge had sufficient materials before him, which would justify him in the exercise of his judicial discretion in refusing the admission of that document.

I am inclined to agree with the learned District Judge. If I had been trying these cases I should have been inclined to admit the document on terms and I would have given the defendants ample opportunity of substantiating their allegation, which was that this document was not a genuine document. But I am sitting in a Court of Appeal and it is for the appellants to show that the learned Subordinate Judge exercised his discretion wrongly in deciding that the document ought not to be admitted.

The material facts, in my opinion, are these: In March, 1914, the plaintiffs filed a list of documents in Court and referred to this document in these terms: "The *likhan* in respect of the *pattani majkuri taluk* granted by Maharajadhiraj Ram Krishna Roy. The certified copy to be filed afterwards of the said *likhan* through witness Kshirod Lal Pakrasi."

The plaintiffs in July, 1914, gave notice to the defendants to produce the original *patta*. The defendants in the same month of the same year stated that they had no such document. Then in the following year 1915 in the month of June the case was tried.

One of the points at the trial was whether the plaintiffs were entitled to sue having regard to the provisions of s. 188 of the Bengal Tenancy Act, and it was on that ground that the learned Judge who tried the cases dismissed the suits. But it is clear from what was read to us to-day by the learned Advocate for the defendants that one of the issues was whether the

rent was enhanceable. It is clear that evidence was produced in respect of that issue and from the learned Judge's judgment it is clear that although he decided the case upon the preliminary point, that the plaintiffs were not entitled to sue by reason of the provisions of s. 188, he had evidence upon the other issues. If that be so, I do not understand how it was that the plaintiffs did not call upon the witness, who was supposed to have this document in his possession to produce it at the trial in 1915.

There was an appeal to the lower Appellate Court and then an appeal to the High Court. The case was remanded sometime in 1919 for further trial. Then it was that the plaintiffs for the first time endeavoured to give evidence in respect of that document in 1920, and the learned Subordinate Judge rejected it. Having regard to the circumstances I think it is impossible to say that the learned Judge did not exercise his discretion in a judicial way. I think it is impossible to say that there were not materials before him which would justify him in coming to the conclusion that the document should not be admitted. The result, therefore, is that on this point the appeal must fail.

The other question, with which I have to deal, is whether the learned District Judge was right in his conclusion that the rent, in respect of the *taluk*, was fixed in perpetuity. In spite of the argument which was addressed to us by the learned Advocate, who appeared for the appellants (to which it was a pleasure to listen) I am not convinced that the learned District Judge was wrong.

I think the learned District Judge's conclusion as regards the origin of the *taluk* is right on the evidence which was before him.

In the first place he held that the *taluk* could not have been in existence at the time of the Decennial Settlement. That I understand was in 1789. In my opinion there is no doubt about that.

The learned District Judge then held that it must have come into existence between 1789 and 1801. There is no doubt about that, because it was not in existence in 1789 and it clearly was in existence in 1801, because the revenue sale by which the Pakrasi brothers became the owners was in 1789 and there was a partition between these two brothers by metes and bounds in 1800. It was either in 1799 or 1800 that the then *talukdar* was dispossessed by the purchasers at the revenue sale. Therefore, I agree with the learned Judge so far.

The learned District Judge then proceeded to say "whether before or after 1793 there is no indication whatever."

If the document, to which I have already referred is excluded from evidence, I agree with the learned District Judge that there is nothing to show whether the *taluk* was created before or after the Permanent Settlement of 1793. It must have been created, in my opinion, about that time. It may have been shortly before or shortly after.

The learned Advocate, who appeared for the appellants, argued that even if the *taluk* had been created before the Permanent Settlement the fact that the rent was enhanced in 1803 is sufficient to show that the rent was not fixed in perpetuity. Here again I agree with the learned District Judge's conclusion. The rent came to be enhanced in 1803 by reason of the fact that Ganga Gobinda Sanyal, the then *talukdar*, who had been dispossessed, brought a suit. As the result of that suit a decree of the Court was made, as I understand, to the effect that he should be restored to possession on his undertaking to pay the rent in accordance with that which was customary at that time in the *pergana*. That order was made in pursuance of s. 5 of Regulation XLIV of 1793. It is obvious that s. 5 deals with an exception to the provisions of s. 4 of that Regulation. I need not read the terms, inasmuch as the section has often been the subject of judicial consideration. I cannot agree with the contention of the learned Advocate for the appellants as to the effect of s. 5. In my opinion it is this. It means that the *talukdar* was entitled to stay in or get possession of the subject of the tenure, provided that he was prepared to comply with the demand, which the purchaser was entitled to make under the section,—which was to collect "whatever the former proprietor would have been entitled to demand according to the established usages and rates of the *pergana* or District in which such lands may be situated, had the engagement so cancelled never existed." The fact that the *talukdar* had to pay enhanced rent by reason of the provisions of s. 5, in my opinion, does not show conclusively that the rent was not fixed. The question, therefore, remains to

be considered upon the main facts of these cases.

The learned District Judge, in a careful and well-considered judgment, weighed the facts which were undoubted and came to the conclusion that, although in the first instance the onus was upon the defendants to show that the rent was a fixed one in perpetuity, that onus had been removed by reason of the main facts of the case which had been proved. In the first place the tenure which was undoubtedly vested in the defendants' predecessor was described as a *patni*, it undoubtedly had the other ordinary incidents which were attached to a *patni* tenure, and there was no reason why it should not have the usual incidents of a fixed rent. In the next place there is the fact that the rent was at the same rate for about 100 years and there is no doubt that the value of the tenure must have increased to a very large extent having regard to the remarks which were made by the learned Subordinate Judge in his judgment. He considered from the calculations which had been put forward that "the existing *jama* was liable to be enhanced to even five times in certain cases." In order to be on the safe side and having regard to the circumstances he contended himself by increasing the *jama* to double the existing *jama* in the respective cases. The value having increased to such an extent and there having been no variation of rent for so many years and having regard to the undoubted nature of the tenancy, I am not satisfied that the learned District Judge was wrong in arriving at the conclusion that the rent in this particular tenure was fixed in perpetuity.

The appeals are dismissed with costs.

B. B. Ghose, J.—The main question is whether the plaintiffs are entitled to claim enhancement of the rent payable by the tenants in these appeals.

The history of the tenure, so far as it appears from the findings of the learned Additional District Judge, may be shortly stated thus: This tenure was in the possession of one Ganga Gobinda Sanyal. It was sold for arrears of revenue in 1799 or 1800 A. D. and purchased by two brothers who may be called the Pakrasis. After their purchase they dispossessed the tenure-holder of the tenure on which the tenure holder brought a suit for recovery of possession. In that suit it appears that an order was made by the Court dated the 19th of April, 1803, under which it was ordered that the tenure-holder should be put into possession of the tenure on his undertaking to pay the *pergana* rate of rent to the auction-purchasers in terms of s. 5 of Regulation XLIV of 1793. Thereupon it appears that the tenure-holder executed an *ekrar* in favour of a Court Officer in 1803 in which he undertook to pay the *pergana* rate of rent for the tenure to the auction-purchasers and that so long as the *pergana* rate was not ascertained he would pay the previous rent which was Rs. 4,891. The *pergana* rate was settled by the Court in 1821 which was found to be Rs. 10,775 and since then the tenure-holder and his successors-in-interest had been in possession of the property on payment of that rent.

In 1897 it appears that the *zemindari* interest came into the possession of five sets of landlords and the tenure was in the possession of 15 or 16 sets of tenants or possibly more. The defendants in these cases executed separate *kabuliyats* in favour of different sets of landlords engaging to pay the rent payable by them to each set of landlords separately and it was stated in the *kabuliyats*, the earliest of which is dated September, 1897, that this arrangement was entered into for the purpose of saving the tenants from the liability of being deprived of their property on account of defaults being made by their co-sharers.

I may here state that in this *ekrar* of 1803 the interest of the tenure-holder has been described as "my *patni taluk*" consisting of certain villages in the *pergana*. In the *kabuliyat* of 1897 which I have referred to, the interest of the tenure-holder has been described as "*Patni majkuri taluk*," and it is further stated that the landlord, in whose favour the *kabuliyat* was executed for the share of the rent payable to him on account of the share of rent for which the tenant was liable, would be entitled to proceed to sell the interest under the Patni Regulation VIII of 1819.

Things went on apparently without any further trouble till the year 1913 when three of the suits out of which three of these appeals arise were brought for the purpose of recovery of rent as well as for enhancement. It is not necessary for me to relate the vicissitudes of fortune which these three cases had. It appears that these cases ultimately came to be heard by the Subordinate Judge in 1920 along with three other suits out of which the other appeals have arisen which were instituted

in the year 1917. The Subordinate Judge made a decree increasing the rent to double of what was previously paid by the tenants. This part of the decree has been reversed and the learned Additional District Judge has made a decree for the rent payable as stipulated in the *kabuliyat*.

The main contention is whether the rent payable, as I have already stated, is liable to enhancement. I may here add that we had a very elaborate and interesting argument attacking the judgment of the learned District Judge, but after carefully considering the argument, I am of opinion that the judgment of the learned District Judge must be supported.

The first contention that is raised is with regard to s. 6 of the Bengal Tenancy Act; and it is argued that this particular tenure was not held from the time of the Permanent Settlement and that, therefore, there was nothing to prevent the landlord from asking for enhancement of rent.

In support of this contention it was urged that a copy of a certain document was wrongly refused by the Subordinate Judge in the trial Court and that, although the learned Additional District Judge, on appeal, expressed the opinion that if he had been sitting as a Court of first instance he would have accepted the document, he declined to admit it as the Subordinate Judge, in his opinion, had given sufficient reasons for exercising his discretion in not accepting it. It is urged that it should have been admitted in evidence, and it would show that the tenure was created after the Permanent Settlement.

I will deal with this point later on. For my present purpose I will proceed on the assumption that this tenure was not held from the time of the Permanent Settlement. Assuming that to be so, the contention of the learned Advocate for the appellants was that his clients were entitled to enhancement of rent under s. 7 of the Bengal Tenancy Act which commences thus: "Where the rent of a tenure-holder is liable to enhancement, it may, subject to any contract between the parties, be enhanced up to the limit of the customary rate payable by persons holding similar tenures in the vicinity." The argument in substance appears to be that where a tenure has not been held from the time of the Permanent Settlement the landlord is *prima facie* entitled to enhancement of rent. There is a large body of authority in support of this contention; for instance, the case of *Bimal soondery Dassyah* v. *Radhika Chowdhrain* (1) which lays down that the *zemindar* has a *prima facie* right to ask for enhancement of rent of under-tenures from time to time unless there is anything to prevent him from doing so.

The question, therefore, resolves itself into this: whether having regard to the circumstances of the case as found by the learned Judge, there is anything to prevent the landlord from asking for enhancement of rent; and in deciding this question regard must first be had to the rights of the parties in these cases with reference to the provisions of s. 5 of Regulation XLIV of 1793. The plaintiffs in these cases claim title by succession from the auction-purchasers at a revenue sale of the *zemindari* and it is urged that they are not bound by any contract as to fixity of rent if the tenure was created after the Permanent Settlement. The question with regard to the construction of this section, the terms of which appear to be very drastic, is *res integra*. This section was construed by the Judicial Committee in the case of *Kanee Surnomoyee* v *Maharajah Sutteeschunder Roy Bahadoor* (2); it was observed by their Lordships: "Now, looking at what follows in the same clause, it is obvious that no such absolute cancellation was intended, for the power expressly and affirmatively given to the purchaser supposes the *talukdars* and the *ryots* to remain in all respects as before, except that they become liable to a certain limited increase of rent, according to the established usage and rates." At page 147* their Lordships observed: "The conclusion at which their Lordships have arrived as to the construction of the section is this—that a power was given by it to the purchaser at a Government sale for arrears to avoid the subsisting engagements as to rent, and to increase the rent to that amount at which, according to the established usages and rates of the *pergana*, or district, it would have stood had the cancelled engagement so avoided never existed. This gives it a just and reasonable operation, and virtually it would have had none, when the existing rent was already according to the usages and rate of the *pergana*." The

(1) 13 M. I. A 248; 4 B. L. R. P. C 8; 13 W. R. P. C. 11; 2 Suth P. C. J. 293; 2 Sar. P. C. J. 524; 20 E. R. 544.

(2) 10 M. I. A. 123 at p. 146; 2 W. R. P. C. 13; 2 Sar. P. C. J. 60; 19 E. R. 918.

*Page of 10 M. I. A.—[*Ed.*]

revenue sale, therefore, did not affect the other terms of the contract which there might have been between the parties at the time of the creation of the tenure.

We have no direct evidence as to what the actual terms were as regards the enhancibility of the rent. This must, therefore, be inferred from the other circumstances in the case, and the other circumstances from which an inference may be drawn have been very carefully stated by the learned District Judge from whose judgment these appeals are preferred. I need refer to only a few of them. The first is the statement in the document to which I have already referred that the tenure was a *patni*. In my opinion, the grant of a *patni* connotes that the rent is fixed and I say this as I may claim a certain amount of experience with regard to what *patni taluks* are.

A case has been cited on behalf of the appellants reported as *Nirod Chandra* v. *Harihar* (3) where it seems to have been observed that the expression "*patni taluk*" did not import fixity of rent. The judgment, however, is not based on that ground as will appear from the following observation: "But it is perfectly plain that this document does not create a *patni taluk*, in other words, a *taluk* subject to the summary procedure for realization of rent provided by Regulation VIII of 1819." The learned Judge in the Court below has, in my opinion, rightly distinguished this case in his judgment where he observes: "In that case the tenants relied on the description of the *taluk* as a *patni*, but it was found to be liable to enhancement." Lower down he says: 'It was conceded that the document did not create a *patni taluk* in the technical sense, and there was no reference to the terms of the Patni Regulation." The only thing that may be said is that the mere mention of a *taluk* as a *patni taluk* does not create a *patni taluk*. There may be other terms in the document which may show that although the word "*patni*" was used it was not really a *patni taluk*; and in the case referred to above it would appear that it was conceded by the party claiming under the *kabuliyat* that it was not a *patni taluk*. This case is, therefore, of very little authority in favour of the contention that the use of the word "*patni*" does not connote fixity of rent.

On the other hand, by a reference to the preamble under Regulation VIII of 1819 it would be found that tenures with a right of heritability and fixity of rent were being created in spite of the prohibition under the Regulations for a considerable number of years known as *patni taluks*, and that Regulation was enacted for the purpose of regulating the rights of the parties as regards realization of rent and so on. Further, in the documents which were executed so late as 1897 there is a reference to the fact that the tenures would be liable to sale under the provisions of Regulation VIII of 1819. Taking these facts together into consideration it would require a very strong circumstance to show that the rent was not fixed in perpetuity.

Having regard to the facts to which I have referred I need not refer in detail to the use of the word "*majkuri*" in the documents relating to this tenure. As the District Judge has pointed out, the word "*majkuri*," according to Mr. Field in his well-known introduction to his edition of the Bengal Regulations under note (2) of s 35, was an older name of a *sikmi taluk*, which means older than the Decennial Settlement, and the definition of the word in Wilson's Glossary is much more favourable to the position of the tenants, because it shows that tenure-holders holding a *majkuri taluk* were only to pay the revenue through the *zemindars*. We may accept the contention on behalf of the appellants that these words were not used according to their true significance but were loosely used in those documents. But, apart from that, the use of the word *patni* and the fact stated that Regulation VIII of 1819 should be had recourse to for the purpose of recovering arrears of rent are sufficient to establish the fact of the fixity of rent. One other case was relied upon by the learned Advocate for the appellants. It was the case of *Jogesh Chandra Roy* v. *Makbul Ali Chowdhury* (4) where it was observed that the mere fact that there was a stipulation in the *kabuliyat* that Regulation VIII of 1819 might be resorted to for the purpose of recovery of rent did not import fixity of rent. There cannot be any dispute with regard to that question whatsoever, because in that case the tenure was an *etmam* created with reference to lands which were situated in a temporarily settled estate, and with regard to such a tenure, the mere fact that

(3) 58 Ind. Cas. 867; 24 C. W. N. 874; 32 C. L. J. 19.

(4) 54 Ind. Cas. 850; 30 C. L. J. 140; 23 C. W. N. 915.

the parties had agreed that resort might be had to the Putni Regulation to recover arrears of rent could not mean that the rent was permanently fixed.

Then, I would further observe that having regard to the lapse of a long series of years extending to a century when the value of the property has gone up at least 500 per cent., according to the estimate of the Subordinate Judge, and no attempt having been made during all this period to claim any enhancement of rent, a legitimate inference can be made that the original contract was that the rent should be fixed for ever. I may refer here to the observations made by their Lordships of the Judicial Committee in the case of *Baboo Dhanput Singh* v. *Gooman Singh* (5). At page 466* their Lordships observe: "Upon this second point, the evidence of the subsequent acts and conduct of the *zemindars* is material only in so far as the receipts and proceedings above referred to show that both Aghum Singh and his successors were described as *mocurreredars*. Their Lordships are not prepared to say that, from this evidence, a Court or Jury might not legitimately infer, as against the first *zemindar* and his successors, either that the rent had been always fixed, or that, by subsequent contract, that, which had been originally variable had been made invariable." The circumstances of these cases all lead to the legitimate inference that even assuming that this tenure was created after the Permanent Settlement the rent was originally fixed or it might have been fixed at some other time about which there is no evidence.

I must next shortly deal about the reception of the copy of a *potta* about which the appellants have made a grievance before us. There cannot be any doubt that the plaintiffs have been guilty of gross laches in the production of this document and in these particular cases it cannot be said that the Subordinate Judge was entirely wrong in rejecting the acceptance of the document in the exercise of his discretion. I need not recaptulate the facts again, but the argument on behalf of the appellants gains support from the observations made by the learned Additional District Judge on appeal. I should myself have thought that where there was no reasonable ground for suspicion that a document might have been fabricated after the filing of the plaint such as documents obtained from public offices or copies obtained from Court and with regard to which the other side might not be prejudiced as being taken by surprise or not having any opportunity of adducing rebutting evidence, the Court may properly, in the exercise of its sound discretion, receive such documents in evidence and then decide as to their probative value giving every opportunity to the other side to rebut the effect of those documents if they were believed. In these cases the document was alleged to have been a copy obtained from some Court where the original was alleged to have been filed, and under these circumstances if the plaintiffs had not been so negligent in the production of the document in Court, it might reasonably have been accepted by the Court. I would only impress upon the trial Court the fact, as observed by the Judicial Committee in the case of *Indrajit Pratap Bahadur Sahi* v. *Amar Singh* (6) that "rules of procedure are not made for the purpose of hindering justice." Wide discretion has been given to the Court with regard to matters of reception of evidence although the documents have not been entered in the list of documents filed by the parties, and this discretion should be exercised for the furtherance of justice.

The last point that remains is with regard to the application of s. 188 of the Bengal Tenancy Act to these cases. The learned Advocate for the respondents endeavoured to support the judgment of the learned Judge on the ground that the suits for enhancement of rent were not maintainable having regard to s. 188 of the Bengal Tenancy Act. I need only say that, having regard to the terms of the *kabuliyat* of 1897 there is no doubt in my mind that the interest of the tenants as well as the interest of the landlords have been separated. It cannot be said that the plaintiffs still remain the joint landlords of the tenants.

On the grounds I have stated I agree that the appeals must be dismissed with costs.

A. N. A. *Appeals dismissed.*

(5) 11 M. I. A. 433 at p. 466; 9 W. R. P. C. 3; 2 Suth. P. C. J. 92; 2 Sar. P. C. J. 309; 20 E. R. 164.

*Page of 11 M. I. A.—[*Ed.*]

(6) 74 Ind Cas. 747; 50 I. A. 183 at p. 191; 39 C. L. J. 318; 21 A. L. J. 554; 4 P. L. T. 447; A. I. R. 1923 P. C. 128; 1 Pat. L. R. 345; 2 Pat. 676; 33 M. L. T. 233; 45 M. L. J. 578; 18 L. W. 728; 25 Bom. L. R. 1259; 28 C. W. N. 277 P. C.).

PRIVY COUNCIL.

APPEAL FROM THE SPECIAL COURT OF SWAZILAND.

April 15, 1926.

Present:—Lord Chancellor (Viscount Cave), Viscount Haldane, Lord Parmoor, Lord Phillimore and Lord Blanesburgh.

SOBHUZA II—APPELLANT

versus

MILLER AND OTHERS—RESPONDENTS.

Foreign Jurisdiction Act, 1890 (53 & 54, Vict. c. 37), ss. 1, 3, 11—British Protectorate—Sovereignty, nature of—Control by British Government, extent of—Excessive interference, legality of—Orders in Council for acquiring lands of Protectorates—Previous convention not to interfere with rights of native subjects, effect of—Act of State—Crown, power to make Orders in Council in contravention of prior conventions.

Generally in the case of a British Protectorate, although the protected country is not a British dominion, its foreign relations are under the exclusive control of the Crown, so that its Government cannot hold direct communication with any other foreign power, nor a foreign power with its Government. The protected State becomes only semi-sovereign, for the protector may have to interfere, at least to a limited extent with its administration in order to fulfil the obligations which international law imposes on him to protect within it the subjects of foreign powers A restricted form of extra territorial sovereignty may have its exercise called for, really involving division of sovereignty in the hands of protector and protected. An extension of interference beyond these limits may have to be referred to an exercise of power by an act of State, unchallengeable in a Civil Court, or may be attributed to statutory powers given by the Foreign Jurisdiction Act. [p. 266, col. 2.]

The Foreign Jurisdiction Act renders the jurisdiction acquired by the Crown in a protected country indistinguishable in legal effect from what might be acquired by conquest. [p 267, col. 1]

The application of the Act is not confined to British subjects in foreign country but extends to natives also. [p 267, col. 2.]

A manifestation by Orders in Council of the intention of the Crown to exercise full dominion over lands which are unallotted is sufficient for the establishment of complete power, and this method of peacefully extending British dominion is unquestionable in law. [*ibid* [

A limitation in a convention on interference with the rights and laws and customs of natives cannot legally interfere with a subsequent exercise of the sovereign powers of the Crown, or invalidate subsequent Orders in Council. [p. 269, col. 1.]

An Order in Council providing for power to set apart for the natives certain lands in a Protectorate which were the subject of concessions by the paramount chiefs, and enabling a High Commissioner to acquire the remaining land and to deal with it in spite of the fact that there was a previous convention under which the British Government had agreed not to interfere with the rights of the natives therein is not invalid inasmuch as the Crown has power to make such an order either under the Foreign Jurisdiction Act or as an act of State and the Crown cannot, except by Statute, deprive itself of its freedom to make Orders in Council even when these are inconsistent with previous orders. [p. 269, cols. 1 & 2.]

Rex v. *Earl of Crewe* (1) and *In re Southern Rhodesian Land* (2), relied on.

Appeal from a judgment of the Special Court of Swaziland, dated the 27th May, 1924.

Mr. *Horace Douglas*, for the Appellant.

Sir *Douglas Hogg, K. C.*, Attorney-General and Mr. *H. M. Viveen*, for the Respondents.

JUDGMENT.

Viscount Haldane.—This is an appeal from a judgment of the Special Court of Swaziland by which a petition of the appellant has been dismissed with costs. The petition was presented against the first respondent, and the second respondents, the Swaziland Corporation, Limited, were added at the trial on the footing that they claimed to own the land in controversy and that the first respondent was acting as their manager. The substance of the petition was that certain lands, known as Farm 188, formed part of an area originally subject to a concession known as the "Unallotted Lands Concession," granted by the former King of the Swazis, Umbandine, on 26th July, 1889. Under this concession the grantees bound themselves to respect all prior rights, and, further, in no way to interfere with the rights of the native subjects of the grantor. The concession of 1889 was expressed to have been made by the King with the advice and consent of his Indunas in Council in favour of two persons, Thorburn and Watkins, of exclusive grazing, and to have conferred agricultural and planting rights over the unoccupied land within the concession, for fifty years, with a right to renewal, at a yearly rent of £50. The King, in consideration of this, undertook to protect the concessionnaires in the exercise of their rights The claim made in the petition was that the first respondent had trespassed on the existing rights of native occupiers and had caused them to be ejected from the land they occupied.

Evidence was taken at the trial of the petition. It was found that certain natives and their predecessors had been for a long time in occupation of portions of the land included within the concession, and that they were now being ejected from the portions of the land other than such as had been demarcated for the sole and exclusive use of the natives. The judgment of the Court set out that the original concession had been confirmed on 17th December, 1890,

by the High Court of Swaziland, a Court constituted by the King of the Swazis with the assent of the British Government and the South African Republic, and having jurisdiction to inquire into the validity of concessions such as that in question. But on the 19th September, 1903, the concession was expropriated by the High Commissioner by notice to the concessionnaires under s. 12 of proclamation No. 3 (Swaziland), 1904. The judgment went on to state that by Order in Council of 2nd November, 1907, the area of the concession became Crown land, as having been expropriated and that a portion of it was granted to the respondent Company, who claimed a clear freehold title under the grant. The natives, on the other hand, claimed that their rights of use and occupation under native law had not been affected. It was contended for them that the rights they possessed before and after the granting of the concession remained intact, and had been recognised later on by s. 5 of the Order in Council made on 25th June, 1903, and that these rights had not been subsequently cut down. The Court held that, at all events by the Order in Council made on 2nd November, 1907, the ownership of the land had passed to the Crown, and that the effect of this was to extinguish any rights of use and occupation that were in the natives; and that the documents and circumstances showed that it was intended to extinguish all such rights. As a matter of fact, the natives were given instead sole and exclusive rights over one third of the land included in the concession, and the concessionnaires had been given such rights over the remaining two-thirds. In the opinion of the Court below, the Order in Council of 2nd November 1907 was validly made. Even if Swaziland was no more than a Protectorate, it was one which approximated in constitutional status to a Crown Colony, and the Crown had power to make laws for the peace, order and good Government of Swaziland, and of all persons therein. Any original native title had, therefore, been effectually extinguished.

The question which their Lordships have to consider is whether this conclusion was right in point of law. Into any topic of policy they are, of course, precluded from entering. In order to come to a conclusion on the legal question it is necessary to look at the history and circumstances in which it has arisen.

Swaziland lies on the east of the Transvaal, between that country and the coast. It was treated as an independent Native State both by the South African Republic and by the British Government, notwithstanding a good deal of interference by both in its affairs, and it was recognised, and still is recognised, as a Protectorate. But the South African Republic appears, from the terms of the convention made in 1894, to have become preponderant in the internal control. The relationship seems to have been recognised as being one in which Swaziland stood to the Republic as a protected dependency administered by the South African Republic. This Protectorate stopped short of incorporation, but apparently it was recognised by the convention of 1894 between Great Britain and the South African Republic (Art. II) as giving the latter, without incorporation, all rights of protection, legislation, jurisdiction and administration over Swaziland, and the inhabitants thereof. The natives were, however, guaranteed in their laws and customs, so far as not inconsistent with laws made pursuant to the convention, and in their grazing and agricultural rights, with the proviso that no law thereafter made in Swaziland was to be in conflict with the guarantees given to the Swazi people in the convention.

The question which at once presents itself is, what is the meaning of a Protectorate. In the generel case of a British Protectorate, although the protected country is not a British dominion, its foreign relations are under the exclusive control of the Crown, so that its Government cannot hold direct communication with any other foreign power, nor a foreign power with its Government. This is the substance of the definition given by Sir Henry Jenkyns at page 165 of his book on British Rule and Jurisdiction beyond the Seas. Their Lordships think that it is accurate, and that it carries with it certain consequences. The protected State becomes only semi-sovereign, for the protector may have to interfere, at least to a limited extent, with its administration in order to fulfil the obligations which international law imposes on him to protect within it the subjects of foreign powers. A restricted form of extra-territorial sovereignty may have its exercise called for, really involving division of sovereignty in the hands of protector and protected. But beyond this, it may

happen that the protecting power thinks itself called on to interfere to an extent which may render it difficult to draw the line between a Protectorate and a possession. In South Africa the extension of British jurisdiction by Order in Council has at times been carried very far. Such extension may be referred to an exercise of power by an act of State, unchallengeable in any British Court, or it may be attributed to statutory powers given by the Foreign Jurisdiction Act, 1890. This Statute provided, upon the preamble that by treaty, capitulation, grant, usage, sufferance, and other lawful means, the Crown has power and jurisdiction in divers countries and places outside its dominions, and that it was expedient that Acts relating to the exercise of such jurisdiction should be consolidated, that it should be lawful for the Sovereign to hold, exercise and enjoy any jurisdiction now or hereafter possessed within a foreign country in the same and as ample a manner as if the jurisdiction had been acquired by cession or conquest of territory, and that every act and thing done in pursuance of any such jurisdiction was to be as valid as if it had been done according to the local law then in force in that country. It was provided that any Order in Council made in pursuance of the Act should be laid before both Houses of Parliament within a limited time, and should have effect as if enacted in the Act. The Foreign Jurisdiction Act thus appears to make the jurisdiction, acquired by the Crown in a protected country, indistinguishable in legal effect from what might be acquired by conquest. It is a Statute that appears to be concerned with definitions and secondary consequences rather than with new principles. This view of it was also that taken in an important judgment of the Court of Appeal, *Rex* v. *Earl of Crewe* (1). There, by an Order in Council, the High Commissioner for South Africa had been authorised to provide in the Bechuanaland Protectorate for the administration of justice and for the peace, order and good government of all persons within that Protectorate and the prohibition and punishment of all acts tending to disturb the public peace. Sekgome, the chief of a native tribe, was detained in custody under a proclamation purporting to have been made by the High Commissioner under the powers so conferred. He applied for a *habeas corpus* against the Secretary of State for the Colonies. It was held that the Protectorate was a foreign country within the meaning of the Foreign Jurisdiction Act, and that the proclamation was validly made.

It was further held that the detention was lawful, inasmuch as the construction of the Act settled by practice rendered it impossible to limit its application to British subjects in the foreign country. Lord Justice Vaughan Williams considered that the proclamation under which the detention took place was valid as a law which the Act gave the Crown absolute power to make and apply, just as if the territory had been obtained by cession or conquest. He also held that the detention could be independently justified as an act of State. Lord Justice Kennedy concurred, definitely on the view that the detention could be justified as an act of State, as well as under the Foreign Jurisdiction Act. The stress in the judgment of Lord Justice Farwell, who arrived at the same conclusion as to the validity of the proclamation under which the detention was made, was laid on the construction of that Act, which he interpreted in a similarly wide sense.

In *In re Southern Rhodesian Land* (2), Lord Sumner, in an elaborate judgment given on behalf of the Judicial Committee on a special reference, expressed views which are substantially similar. He held that a manifestation by Orders in Council of the intention of the Crown to exercise full dominion over lands which are unallotted is sufficient for the establishment of complete power. Both of these cases imply that what is done may be unchallengeable on the footing that the Order in Council, or the proclamation made under it, is an act of State. This method of peacefully extending British dominion may well be as little generally understood as it is, where it can operate, in law unquestionable.

Such being the principle, it remains to ascertain whether it has been put in operation in the case under consideration. To answer this question it is first necessary to re-call the true character of the native title to land throughout the Empire, including South and West Africa. With local variations, the principle is a uniform one. It

(1) (1910) 2 K. B. 576; 79 L. J. K. B. 874; 102 L. T. 760; 26 T. L. R. 439.

(2) (1919) A. C. 211; 88 L. J. P. C. 1; 119 L. T. 698; 34 T. L. R. 595.

was stated by this Board in the Nigerian case of *Amodu Tijani* v. *Secretary for Southern Provinces Nigeria* (3) and is explained in the report made by Chief Justice Rayner on Land Tenure in West Africa, quoted in the case referred to at page 404*. The notion of individual ownership is foreign to native ideas. Land belongs to the community and not to the individual. The title of the native community generally takes the form of a usufructuary right, a mere qualification of a burden on the radical or final title of whoever is Sovereign. Obviously such a usufructuary right, however, difficult to get rid of by ordinary methods of conveyancing, may be extinguished by the action of a paramount power which assumes possession or the entire control of the land.

Turning next to the history of what was done in Swaziland by the British Government, the material events may be stated briefly:

Swaziland was originally under the rule of native Kings, and concessions conferring rights in respect of land were granted by them to persons other than natives. The land in question was granted, by the concession known as the "Unallotted Lands Concession" of 26th July, 1889, to Thorburn and Watkins, as already stated. The grant was made by King Umbandine, who reigned between 1875 and 1889. The grant, which was of farming and planting rights for fifty years, with a provision for renewal, at an annual rent of £50, bound the grantees in no way to interfere with the rights of the King's native subjects. There was conferred power to sublet or transfer.

In September, 1890, Ungwane, the then King of the Swazis, set up by organic proclamation a Chief Court composed of three judicial members approved by the British High Commissioner and the President of the South African Republic, such Court to have full jurisdiction over all persons in Swaziland of European extraction, and over all questions, matters and things in which such persons were concerned. The Court was to undertake judicial inquiry into the validity of disputed concessions. In 1890 it confirmed the concession in question. By deed of cession the grantees transferred the area comprised in it, including the territory in dispute, but excepting certain distinct areas which had previously been transferred to others, to the second respondents. Ungwane was succeeded by his son, Sobhuza, the appellant, who is the present King or paramount chief.

When the Boer War broke out in 1899 Swaziland had for some years come to be under the Protectorate of the South African Republic. This was the result of the convention of 1894 between the Republic and the British Government. After the conquest and annexation of that Republic, by Order in Council of 25th June, 1903, the Crown, on the recital that by the conquest and annexation all rights and powers of the South African Republic had passed to the British Sovereign, ordered that the Governor administering the Transvaal might exercise all powers and jurisdictions of the Crown and take all such measures and do all such things as were lawful and in the interest of His Majesty's service, as he might think, subject to instructions, expedient. The Governor was expressly empowered by proclamation to provide for the administration of justice, the raising of revenue, and generally for the peace, order and good Government of Swaziland, and of all persons therein, including the prohibition and punishment of acts tending to disturb the public peace. He was, in issuing such proclamations, to respect any native laws by which the civil relations of any native chiefs, tribes or populations under His Majesty's protection were regulated, except so far as the same might be incompatible with the due exercise of His Majesty's power and jurisdiction or clearly injurious to the welfare of the natives. Such proclamations were to be published and might be disallowed or modified by the Sovereign.

By Order in Council of 1st December, 1906, the powers given to the Governor administering the Transvaal were transferred to the High Commissioner for South Africa.

By a subsequent Order in Council of 2nd November, 1907, on the recital that it was intended that portions of certain lands in Swaziland, the subject of concessions or grants made by paramount chiefs and confirmed by the Chief Court under the organic proclamation of 1890, should be set apart and demarcated for the exclusive use and occupation of natives, and that the remaining portions should be granted or leased to European persons claiming rights under such concessions or should be held by the High Commissioner for South Africa, His Majesty, by virtue of the powers vested in His Majesty under the Foreign Jurisdic-

(3) (1921) 2 A. C. 399; 90 L. J. P. C. 236.

*Page of (1921) 2 A. C.—[*Ed.*]

tion Act or otherwise, ordered that all rights in any land in the said territory, not being land set apart and demarcated by the authority of the High Commissioner for the sole and exclusive occupation of the natives, and proclaimed as Crown lands, and also in any land within the territory lawfully transferred to or expropriated by the High Commissioner in exercise of the powers vested in him by proclamation or otherwise for the peace, order, and good Government of the territory, should vest in and be exercised by the High Commissioner, who might make grants or leases of such lands.

By proclamation of the High Commissioner made on 16th March, 1917, certain areas were proclaimed as Crown lands, and among these areas was a portion of the lands included in the Unallotted Lands Concession of 1889. This had been in 1908 expropriated by notice given by the High Commissioner under the powers vested in the Governor of the Transvaal by the Order in Council of 25th June, 1903, the exercise of which he had provided for by Swaziland Proclamation No. 3 of 1904. Under a Crown grant of 16th March, 1917, the High Commissioner granted to the second respondents a part of the land subject to the concession and now in dispute, as compensation for lands which they had relinquished in his favour. By proclamation promulgated on the same date the High Commissioner had proclaimed to be Crown land the portion of the unallotted land included in the original Unallotted Lands Concession, and this portion included the land granted as compensation to the second respondents and now in dispute.

The principles of constitutional law laid down in the earlier part of their Lordships' judgment render it in their opinion impossible to maintain the argument submitted for the appellant. That argument is that the Crown has no powers over Swaziland, except those which it had under the conventions and those which it acquired by the conquest of the South African Republic. The limitation in the convention of 1894 on interference with the rights and laws and customs of the natives cannot legally interfere with a subsequent exercise of the sovereign powers of the Crown, or invalidate subsequent Orders in Council. But if this be true it makes an end of the appellant's case. For the Order in Council of 1907, after providing for power to set apart certain lands in Swaziland, the subject of concessions by the paramount chiefs, enabled the High Commissioner to acquire the remaining land and to deal with it. He had, therefore, full power to make the Crown Grant of 16th March, 1917. The power of the Crown to enable him to do so was exercised either under the Foreign Jurisdiction Act, or as an act of State which cannot be questioned in a Court of Law. The Crown could not, excepting by Statute, deprive itself of freedom to make Orders in Council, even when these were inconsistent with previous Orders.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed. As the question involved is concerned with constitutional issues and is of far-reaching public interest, they will advise, following precedents in other cases, that there should be no costs of the appeal.

A. N. A. *Appeal dismissed.*

Solicitor for the Appellant:—Mr. *E. F. Hunt.*

Solicitor for the Respondents:—*The Treasury Solicitor.*

MADRAS HIGH COURT.

CIVIL REVISION PETITIONS NOS. 665 AND 666 OF 1924.

May 3, 1926.

Present:—Mr. Justice Ramesam.

MADDUR KRISHNAMMAL BY AGENT SITARAMA CHETTY—PETITIONER

versus

THE COLLECTOR OF COIMBATORE—RESPONDENT.

Land Acquisition Act (I of 1894), ss. 18, 31—Award by Land Acquisition Officer—Statement of claimant refusing to take amount and expressing intention to contest matter before District Court, whether constitutes requisition for reference.

Where, in certain land acquisition proceedings, on notice of the award by the Land Acquisition Officer being served on the claimant, the claimant sent a petition stating "I will not receive the amount but will contest the matter in the District Court,":

Held, that there was a requisition, although implied for reference to the District Judge within the meaning of s. 18 of the Land Acquisition Act. [p. 271, col. 1.]

Petitions, under s. 115 of Act V of 1908, praying the High Court to revise the orders of the District Court, Coimbatore, dated the 29th January, 1924, in (1) I. A. No. 382 of 1923, in O. P. No. 45 of 1923 in Compensation Case No. 3 of 1923 and (2) in O. P.,

No. 45 of 1923 in the said Compensation Case No. 3 of 1923.

Mr. *T. M. Krishnaswami Iyer*, for the Petitioner.

The Government Pleader, for the Respondent.

JUDGMENT.—These two petitions arise out of the same matter. It would be convenient to set out the facts. The Taluk Board of Kollegal applied for the acquisition of some sites for public purposes. Land acquisition proceedings were taken under the Act and an award passed on the 16th February, 1923. Notices of the award were duly served on the parties but they did not appear on that date. We are now concerned only with one of those parties. The parties including the present petitioners put in petitions objecting to the amounts of compensation. This is the statement made by the Revenue Divisional Officer in his letter dated the 26th February, 1923. The letter gives further information about the proper values of the three sites and the second site is the site of the petitioner. I, therefore, infer that the petitioner also sent petitions like the others when the letter of the 26th February, 1923 was received by the District Judge. He returned it to the Revenue Divisional Officer with the following endorsement. "It does not appear from the letter of reference whether under s. 18 of the Act the claimants asked by written application for a reference to this Court." The original letter and the endorsement were again returned to the District Judge by the Revenue Divisional Officer with this endorsement. "Resubmitted with separate reference for each case....." The parties have not applied for a reference to the District Court though they take objections to the amount of compensation awarded to them and as such the cases come under s. 31 (2) of the Land Acquisition Act.

When this was received by the District Judge notice was ordered to the claimant. On the 23rd August the claimant appeared by a Vakil. The Vakil finding that the only reference was under s. 31 (2) took time and filed another petition dated the 28th August with an affidavit. It was stated in this affidavit that the petitioner filed a petition on the 24th February to the Revenue Divisional Officer and she filed an office copy of the petition with a certificate of posting. She contended that she requested a reference to the District Judge in that petition and she further prayed that her present petition may be taken as one under s. 18 of the Act even if the petition of 24th February did not amount to an application for reference. On the 29th September records were called for. They were received but as no copy of the petition of the 24th February was found, the Judge asked the Revenue Divisional Officer to make a further search for the particular petition. The Revenue Divisional Officer reported that all the papers with him have been sent on the 29th January, 1924. Apart from the certificate of posting and her private copy of the petition, in view of the statement by the Revenue Divisional Officer in the letter dated 26th February, there is no doubt that by the 26th February there was a petition to the Revenue Divisional Officer sent by the present petitioner and it is not now traceable. That being so, I think I may accept the private copy she produces as the correct copy. The ground on which the District Judge passed his order is that this petition does not amount to a requisition for reference under s. 18. His translation of the material sentence is "I will not receive the amount but will contest the matter in the District Court." The petition itself has been translated here which says:—"We shall engage a Vakil and conduct the suit in the District Court." I do not think there is much difference between the translation here and in the District Court and I think that both implied that she meant to fight out the question of value in the District Court. She can carry on such a fight only if the matter is referred to the District Judge. Her statement, therefore, implies a request to the Revenue Divisional Officer to send the papers to the District Court. No doubt it would have been better if she did not leave it to be implied but made it express. But it is now clear that the Revenue Divisional Officer did understand it to be a requisition for reference under s. 18, for he concludes his letter of the 26th February thus:—"In these circumstances I submit under s. 18 of the Act I of 1894 that the matter may be kindly adjudicated by you. A copy of the award is enclosed herewith." It may be that the section itself was not mentioned in the petition but from the spirit of it, it ought to be construed as a petition under s. 18,

The Revenue Divisional Officer did so construe it. On the return of the letter by the District Judge, he seems to have gone back on his first opinion and thought that the only reference he is entitled to make was under s. 31 (2) but it seems to be that these are cases where the first thoughts are the best. I think the Revenue Divisional Officer's first understanding of the petition was right. I think there is an obvious requision for reference to the District Judge. I allow the petition C. R. P. No. 665 of 1924 and that will go back for enquiry according to law.

Civil Revision Petition No. 666 of 1924 requires no order.

I think the respondent should pay the costs of the petitioner in C. R P No. 665 of 1924. The costs of the lower Court will abide the result. In estimating the costs of this Court the petitioner will have also the costs of the documents in C. R. P. No. 666 of 1924, as if they are part in C. R. P. No. 665.

V. N. V. *Petition allowed.*

OUDH HIGH COURT.

SECOND CIVIL APPEAL No. 503 OF 1925.

AND

MISCELLANEOUS APPEAL No. 31 OF 1926.

November 24, 1926.

Present:—Mr. Justice Raza and Mr. Justice Misra.

BHABHUTI—PLAINTIFF—APPELLANT

versus

GUR DASS—DEFENDANT—RESPONDENT.

Appeal—Review filed after filing of appeal—Right of Court to decide review—Proper remedy—Contribution—Execution of bond, whether payment.

If an application for review is filed after an appeal has been filed by the applicant or the opposite party, the Court to which the application for review is made has no jurisdiction to entertain the application and must direct the applicant to seek his remedy in the Appellate Court. [p. 272, col. 2.]

Sarju Prasad v. *Sheo Charan Lal* (1) and *Ujagar* v. *Ram Sahai* (2), followed.

The mere execution of a bond for a joint debt does not constitute payment of the debt so as to entitle the executant to maintain a suit for contribution against his co-contractor. [p. 273, col. 1.]

Jagannath Kuar v. *Sheo Singh* (3), followed.

Appeal from a decree of the Additional Subordinate Judge, Gonda, dated the 19th August, 1925, modifying that of the Munsif, Gonda, dated the 30th April, 1925.

Mr. *S. N. Roy*, for the Appellant.

Mr. *L. S. Misra*, for the Respondent.

JUDGMENT.—These two appeals arise out of the same suit under the following circumstances:—

One *Musammat* Indarbasi executed a mortgage-deed with possession on the 29th January, 1918, in respect of a four-annas share in village Gauria and a four-annas share in village Solehri situate in District Gonda, for Rs. 5,000. The mortgage was in favour of three persons, namely, Gonge, Bhabnuti, plaintiff, and Gurdass, defendant No. 1. One Har Charan who happened to be the reversionary heir of *Musammat* Indarbasi's husband joined her in the execution of the said deed of mortgage Gonge, one of the mortgagees, paid half the consideration money, namely, Rs. 2,500; and his interest in the mortgage, therefore, extended to a half. The other mortgagees, namely, the plaintiff and defendant No. 1 who are first cousins undertook to pay the other half of the consideration, *viz.*, Rs. 2,500 and thus became interested in the remaining half. The consideration of Rs. 2,500 which was to be paid by the two latter mortgagees, was, as entered in the mortgage-deed, made payable in the following manner: Rs. 1,100 were to be credited on account of the decrees held by the plaintiff against the mortgagor, *Musammat* Indarbasi, and Rs. 380 were similarly to be credited on account of a decree held by defendant No. 1 against her. The remaining sum of Rs. 1,020 was to be paid at the direction of the mortgagor to various persons. Rupees 500 were made payable to one Mahabir, Rs. 370 to one Bhaiya Harbhan Dutt on account of a decree for arrears of rent held by him against the mortgagor and Rs. 150 to another creditor named Gaya Singh. It is admitted between the parties to the suit that out of the sum of Rs. 1,020, Rs. 500 were paid to Mahabir by the plaintiff alone by executing a deed of mortgage, dated 29th July, 1918, in respect of his own property for a sum of Rs. 700 which included Rs. 500 due from the mortgagor, *Musammat* Indarbasi, and which had been made payable under the deed of mortgage dated the 29th January, 1918, that a sum of Rs. 370 due to Bhaiya Harbhan Dutt on account of his decree for arrears of rent against *Musammat* Indarbasi, was paid by the plaintiff and defendant No. 1 half and half; and that a sum of Rs. 150 made payable to Gaya Singh was paid neither by the plaintiff nor by defendant No. 1 since the said sum had

become barred by limitation. The plaintiff's case, therefore, was that out of the consideration money of Rs. 2,500 which was payable, Rs. 2,350 were actually paid by him and defendant No. 1; that towards this latter sum the plaintiff had contributed Rs. 1,785 as detailed above and defendant No. 1 only Rs. 565; and that the plaintiff, therefore, was entitled to a decree for Rs. 610 against defendant No. 1 on account of his (plaintiff's) payment in excess of his share. The plaintiff, therefore, claimed a decree for this sum together with interest. The suit was brought by him on the 22nd December, 1924.

Defendant No. 1, who is the principal defendant in the case, denied the excess payment and pleaded limitation in his defence.

The learned Munsif of Gonda, who tried the suit, passed a decree dated the 30th April, 1925, in favour of the plaintiff for Rs. 508 and proportionate costs against defendant No. 1. The matter was carried in appeal by defendant No. 1 and Mr. Ahmed Karim, the learned Additional Subordinate Judge of Gonda, by his decree, dated the 19th of August, 1925, allowed the appeal to this extent that he granted a decree to the plaintiff for only Rs. 185 and proportionate costs and dismissed the rest of his claim.

On the 18th September, 1925, the defendant applied for a review to the same Court and on the 12th March, 1926, Mr. Shaukat Husain, who had in the meanwhile succeeded Mr. Ahmad Karim, the Additional Subordinate Judge, accepted the application for review and reduced the sum decreed by his predecessor to Rs. 35 only.

The plaintiff, being dissatisfied with the decree passed in appeal by Mr. Ahmad Karim, filed a second appeal in this Court on the 28th October, 1925. The defendant also filed cross-objections in the second appeal to the decree passed against him by Mr. Ahmad Karim. The plaintiff filed also a miscellaneous appeal on the 24th July, 1926, against the order of Mr. Shaukat Husain, dated the 12th March, 1926.

Both the appeals have been set down for hearing before us at one and the same time.

The learned Counsel for the defendant-respondent took a preliminary objection to the effect that the plaintiff's appeal against the decree passed by Mr. Ahmad Karim was not maintainable on the ground that that decree had been superseded by the latter decree passed on review by Mr. Shaukat Husain, and that the only subsisting decree against which the plaintiff could appeal was this latter decree. The learned Pleader for the plaintiff appellant urged in reply that the order passed by Mr. Shaukat Husain on the 12th March, 1926, granting a review of the judgment was an erroneous order since he had no jurisdiction to hear the application for review after a second appeal had been filed in this Court against the decree of Mr. Ahmad Karim and consequently the decree passed in review was inoperative.

We are of opinion that the preliminary objection taken by the learned Counsel for the respondent cannot be sustained. In *Sarju Prasad* v. *Sheo Charan Lal* (1) a Bench of the Court of the Judicial Commissioner of Oudh consisting of Mr. Chamier (now Sir Edward Chamier) and Mr. Rustomjee held that if an application for review was filed after an appeal had been filed either by the applicant or by the opposite party, the Court to which the application for review was made should decline to proceed with the application until the appeal has been heard and should direct him to obtain the relief which he desires by means of review, by filing cross-objections to the same effect. This view was followed in a later case decided by the same Court by Mr. Chamier, A. J. C. (now Sir Edward Chamier) in *Ujagar* v. *Ram Sahai* (2). In that case the plaintiff respondent obtained a decree for a particular sum from the Court of the Munsif and appealed to the Subordinate Judge claiming a larger sum than had been found due to him by the Munsif. After the notice of appeal had been served upon the defendants they applied to the Munsif for a review of his judgment. He admitted the application and set aside his decree. Meanwhile the respondent's appeal had been taken up by the Subordinate Judge and the decree of the Munsif was confirmed. The plaintiff appealed against the order of the Munsif granting the review and the second decree of the Munsif was set aside in appeal. Mr. Chamier (now Sir Edward Chamier) held that the Munsif had no jurisdiction to entertain the application for review, and observed that if an application for review could be maintainable under those circumstances, it would be open to a Court of first

(1) 7 O. C. 299.
(2) 11 Ind. Cas. 343; 14. 108.

instance on an application for review to supersede the decision of an Appellate or a second Appellate Court and the remedy left to the High Court would, in such a case, be only to interfere in revision. We are in entire agreement with this view and hold that Mr. Shaukat Husain had no jurisdiction to hear the application for review when a second appeal against the decree of Mr. Ahmad Karim had already been filed in this Court by the plaintiff-appellant. In our opinion the proper course, which Mr. Shaukat Husain should have taken, would have been to direct the defendant-respondent, who had applied for a review of the judgment before him, to seek his remedy by filing cross-objections in the appeal filed by the plaintiff-appellant as has actually been done by him. We, therefore, hold that the decree passed by Mr. Shaukat Husain on the application for review of the judgment is a decree bad in law and which he had no jurisdiction to pass. We, therefore, set aside that decree and treat the decree passed by Mr. Ahmad Karim on the 19th August, 1925, as still a subsisting decree against which the second appeal filed by the plaintiff-appellant is fully maintainable. We, therefore, overrule the preliminary objection and decree the plaintiff's appeal (Miscellaneous No. 31 of 1926) and set aside the decree passed by Mr Shaukat Husain on the 12th March, 1926. The plaintiff-appellant will receive his costs from the respondent.

We now proceed to decide the Second Appeal No. 503 of 1925 filed by the plaintiff-appellant against the decree of Mr Ahmad Karim, dated the 19th of August, 1925.

It appears to us to be quite clear from the account which we have given in the earlier portion of our judgment that the plaintiff has actually paid a sum of Rs. 610 in excess of his half share, which sum in the ordinary circumstances he would be entitled to recover from defendant No. 1, were it not for certain reasons which we are now going to mention.

The sum of Rs. 610 which the plaintiff claims on account of excess payment consists of Rs. 500 alleged by him to have been paid to Mahabir by his executing a mortgage-deed in his favour onthe 29th of July, 1918, and of Rs. 110 paid to Bhaya Harbhan Dutt on account of his decree for arrears of rent in the year 1924. It appears that after the execution of the deed in favour of Mahabir the plaintiff-appellant paid him Rs. 168 and on the 17th September, 1924, executed another mortgage-deed in his favour for Rs. 332. The plaintiff-appellant has not, however, been able to establish the date of payment of Rs. 168, and although we have carefully examined the record we are unable to find any proof as to the date when this sum was actually paid. Under Art. 61 of the First Schedule to the Indian Limitation Act, IX of 1908, the period for recovery of a sum paid by the plaintiff for the use of the defendant is three years from the date when the money is paid. The defendant expressly pleaded limitation in defence and in order to obtain a decree for the sum claimed by the plaintiff it was incumbent upon him to establish the date when such payment was made and thereby to satisfy the Court that his claim for recovery of that amount was within limitation. We, therefore, reject the plaintiff's claim for Rs. 168 as being barred by limitation.

Regarding the sum of Rs. 332 we are of opinion that the view taken by the learned Additional Subordinate Judge (Mr. Ahmad Karim) is correct. Relying on a case reported as *Jagannath Kuar* v. *Sheo Singh* (3) he held that the mere execution of a bond by the plaintiff-appellant was not a payment for which contribution could be claimed. Mr. Lindsay, J. C. (now Mr. Justice Lindsay) in that case relied upon two cases, one reported as *Taylor* v. *Higgins* (4) and the other as *Maxwell* v. *Jameson* (5). In the last mentioned case the facts were as follows: Maxwell, Jameson and two other persons gave a joint and several promissory note to a certain firm of Bankers. Some time later Maxwell took up the note and gave his own bond to the firm undertaking to pay the sum by a certain date. No money was, in fact, paid by Maxwell to the Bankers either on account of the bond or on account of the promissory note before the action against the defendant Jameson was begun. It was held that the suit was not maintainable and until the plaintiff had paid money on the bond he could not maintain an action for money paid in order to recover contribution against any of the other makers of the original note. In delivering judgment in that case Bayley, J., remarked as follows:—

"No money has yet come out of the plaintiff's pocket, and *non constat* that any ever

(3) 35 Ind. Cas. 439; 3 O. L. J. 441; 19 O. C. 44.
(4) (1802) 102 E. R. 562; 3 East 169.
(5) (1818) 106 E. R. 286; 2 B. & Ald. 51.

will; for if he recovers from the defendant in the present action, still it is possible that he may never pay it over to Batson and Co., The time for his remedy against the defendant has not yet arrived."

Abbott, J., in the same case observed that "the giving of a new security which extinguished the old debt was not the same thing as payment."

Relying upon these observations we hold that, on the date when the suit was brought, the plaintiff-appellant had no cause of action for basing his contribution suit against defendant No. 1 on the ground of his having executed the deed for Rs. 332 on the 17th September, 1924, in favour of Mahabir. The learned Pleader for the appellant stated during the course of arguments that his client had paid the sum due to Mahabir under the said deed after the filing of the present appeal. If this is a fact the remedy is quite open to the appellant to bring, if so advised, a fresh suit for the recovery of the said sum against the defendant-respondent.

Regarding the sum of Rs. 110 the appellant has, in our opinion, made out his case and he is entitled to a decree in respect of the said sum.

We, therefore, set aside the decrees passed by the learned Munsif on the 30th April, 1925, and that passed by the learned Additional Subordinate Judge (Mr. Ahmad Karim) on the 19th August, 1925, and in lieu thereof grant to the plaintiff-appellant a decree for Rs. 110 with proportionate costs against defendant No. 1. The plaintiff-appellant will receive his costs on this sum and pay those of the defendant-respondent in respect of the sum for which his claim has been dismissed, in all the three Courts. The cross-objections are also dismissed with costs.

G. H. *Appeal No. 31 allowed: Appeal No. 503 partly allowed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1550 OF 1923.

April 6, 1926.

Present:—Mr. Justice Devadoss.

ARUNACHALA UDAYAR—PLAINTIFF—APPELLANT

versus

PACHAYAMMAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Construction—Deed of settlement—Gift to minor... Right to possession postponed till after majority—Interest created, whether vested or contingent.

In a deed of settlement it was provided as follows:—

My daughter *P* and *S*, son of my deceased daughter, are entitled to get my properties.....*P* and her heirs from this day shall enjoy with absolute rights and powers of alienation properties in Schedule A..... *S* on his attaining majority shall enjoy with absolute rights with powers of alienation properties in Schedule B..... A Schedule properties have been delivered to *P* and B Schedule properties to my son-in-law on behalf of *S*.....They should enjoy the whole of the properties as stated above. *P* and his heirs and my son-in-law as guardian of *S* should give us (self and wife) for our maintenance 10 *kalams* of paddy and Rs. 20 in cash. *S* died while yet a minor. On a construction of the Will:

Held, that although possession as regards the minor was postponed till he attained majority, he acquired not merely a contingent interest but a vested interest in the property which on his death passed to his heir-at-law. [p. 276, col. 1.]

Second appeal against a decree of the District Court, West Tanjore at Tanjore, in A. S. No 162 of 1921, preferred against that of the Court of the Additional Subordinate Judge, Tanjore, in O. S. No. 55 of 1919 (O. S. No. 13 of 1919 on the file of the Sub-Court, Kumbakonam).

Mr. *S. Subramania Aiyar*, for the Appellant.

Mr. *S. Varadachariar*, for the Respondents.

JUDGMENT.—The main question in this appeal is as to the construction of a clause in a settlement deed, Ex. A, dated 6th August, 1914. The literal translation of the clause is "my second daughter's son Swaminathan on his attaining majority shall enjoy with absolute rights enabling him to make gifts, sell, etc., the house, house-site, etc., *nanja*, *punja* lands mentioned in Schedule B." Swaminathan died before attaining majority and his father has brought this suit for the recovery of the property settled on him inasmuch as he had a vested interest in the property and that he being the heir of his son is entitled to it. The Subordinate Judge held that Swaminathan had acquired a vested interest in the property and decreed the plaintiff's suit. On appeal the learned District Judge held that Swaminathan had only a contingent interest and as he died before he came of age the settlement in his favour did not take effect and dismissed the plaintiff's suit.

In construing this clause the tenor of the whole document has to be taken into consideration. In the preamble of the docu-

ment, the following clause occurs "I have no male heirs. I had two daughters, namely, Pachayammal and Puval. Of these Puval is dead. She has a minor son aged 13 years, named Swaminathan. These two are entitled to get my properties according to law. In order that they may obtain them and live happily and for my benefit in the other world I have made the following arrangements." Clause 1 is "Pachayammal and her heirs from this day shall enjoy with absolute rights and powers of alienation by gift.....the *nanja* and *punja* lands described in Schedule A." Then the second clause relating to Swaminathan immediately follows cl. 1 in favour of Pachayammal.

The third clause provides for the management of some charities.

The fifth clause reads as follows:—"I have this day delivered the A Schedule properties to Pachayammal, the B Schedule properties to Karuppanna Udayar, Pachayammal's husband and my son-in-law on behalf of the minor Swaminathan and the C Schedule properties for the charities to Pachayammal and Karuppanna Udayar for the minor. They should enjoy the whole of the properties as stated above and Pachayammal and her heirs and Karuppanna Udayar as guardian of minor Swaminathan should give us for our maintenance 10 *kalams* of paddy and Rs. 20 in cash every year out of the income of the lands after deducting Sirkar *kist*, etc."

From the nature of the document it is clear that the settlor wanted to divide the properties between Pachayammal the surviving daughter and the son of the predeceased daughter. In the case of Pachayammal possession was handed over from the date of the document and in the case of Swaminathan, the minor grandson, possession was postponed till he attained majority.

The contention on behalf of the respondent is that Swaminathan was to become entitled to the property settled on him only on his attaining majority and he having died before attaining majority, his heir is not entitled to it. In the document itself there is nothing to indicate that the intention of the settlor was that Swaminathan should have a vested interest only on his attaining majority. In this connection we have to consider what the force of the *tamil* word used in the document is. The word used is "*Anubhavithukollukirathu*." The nominative of that is 'the minor son.' The word means that the minor son shall *enjoy* (the properties) and not shall become entitled (to it). The word that is common used to denote to "inherit" or "become entitled to" is "*Adaikirathu*". If the settlor intended that Swaminathan should be entitled to the property only on his attaining majority then the word "*Anubhavithukollukirathu*" would not have been used but the word "*Adaikirathu*" or some other words which would indicate that he was to become entitled to the property on the happening of a certain event, whether majority or anything else would have been used. In construing the clause of a Hindu Will or settlement the Court should not overlook the habits, customs and prejudices of the people and the motives and reasons which influence them in making bequests or settlements. No Hindu would contemplate with equanimity the death of his grandson when he makes a bequest or settlement in his favour. He would be shocked at the very idea of his son or grandson dying without enjoying the property. There is a strong prejudice against the contemplation of the contingency of a beneficiary, whether son or grandson or daughter or grand-daughter dying in the lifetime of the settlor or dying before he or she takes the benefit under a settlement. In this case the settlor could not have possibly imagined that Swaminathan would die before attaining majority as the very idea of his son or grandson dying before he gets the benefit under a document is repugnant to Hindu sentiment, no Hindu would ordinarily make a bequest over in case the legatee dies before a certain thing happens. In construing Hindu settlements and Wills we should not apply wholesale all those considerations which would apply to the construction of English Wills or Wills drawn up by Attorneys or Vakils. Where a settlement is made in the *mofussil* the document is generally drawn up by a *karnam* or Village Lawyer and the idea of a gift failing and the necessity for providing for a gift over in case of such failure very seldom enters into the mind of the settlor or the persons who advise him. As I have said above it would be considered very inauspicious to imagine that a legatee might not get the benefit of the legacy and this consideration applies with greater force to a settlement by a person who wants to benefit his daughter and grandson.

The intention of the settlor can be gathered from para. 5 of the document. Thereby

he hands over A Schedule properties to his daughter Pachayammal and B Schedule properties are delivered to Karuppanna Udayar on behalf of the minor. It is, therefore, clear that possession of the properties was handed over to the minor Swaminathan through Karuppanna Udayar. The recital of para. 5 "they should enjoy he whole of the properties as stated above, and Pachayammal and her heirs and Karuppanna Udayar as guardian of minor Swaminathan should give us for our maintenance 10 *kalams* of paddy and Rs. 20 in cash every year out of the income of the lands left after deducting Sirkar *kist*, etc.," makes it quite clear that the intention of the settlor was to vest the property in the minor. On a careful reading of the document, Ex. A, it is clear to my mind that settlor handed over the property to Karuppanna Udayar on behalf of the minor and cl. 2 refers only to the enjoyment and not to the vesting of the property.

I, therefore, hold that Swaminathan took a vested interest in the property in Schedule B as the terms of Ex. A are clear. It is unnecessary to consider in detail all the cases relied on by the appellant and respondent. In *Harris* v. *Brown* (1) a testator by his Will provided "that all his residuary estate 'shall descend in equal shares to the eldest son to be born to each of the daughters of my late brother who are now alive. The sons of those daughters shall after their birth, remain under the control of the executor until they attain majority at the expiry of 21 years and whenever the eldest son of any of the ladies shall attain majority, the executor will make over his share to him to his satisfaction.' By cl. 15 of the Will the testator declared that 'until the majority of whoever may be the eldest at the time amongst the sons of my brother's daughters, the estate shall remain n the hands of the executor absolutely and for all purposes.' The Privy Council held that the vesting of the estate in the son was not suspended by the direction that the estate should remain in the hands of the executor who should "make over the share" of each on his attaining 21 years. Those words merely pointed to the possession and enjoyment of the shares which had already been vested.

In *Kolla Subramaniam Chetti* v. *Thellanayakulu Subramaniam Chetti* (2) a Hindu testator appointed executors to conduct his affairs and directed them to pay during the lifetime of his junior widow a monthly payment for life and after the death of the junior wife, the executors were directed to divide the property in equal shares between them and continue to enjoy the same in equal shares. The executors died during the lifetime of the junior wife. It was held that the executors had a vested interest in the property and that their heirs were entitled to the property. See also *Cally Nath Naugh Chowdhry* v. *Chunder Nath Naugh Chowdhry* (3).

Mr. Varadachariar for the respondent relies upon *In re Francis*, *Francis* v. *Francis* (4) as supporting his contention.

In that case the "testator devised two specified free-hold houses to his niece Hilda when she shall attain the age of 25 years," with similar devises of other free-hold houses to another niece and nephew. Mr. Justice Swinfon Eady held that it was a contingent bequest. That case has no application to the present case as the words in Ex. A cannot be interpreted to mean that minor Swaminathan was to get the property on his attaining majority. In an English Will the words generally used are "I bequeath or devise such and such a property to so and so on his attainig majority or when he attains 25 years of age." In *In re Francis*, *Francis* v. *Francis* (4) as observed by the Lord Justice "there is nothing to control the effect of the words of the contingency." Here as observed already cl. 5 makes it quite clear what the intention of the testator was.

Mr. Subramania Iyer raises the contention that Swaminathan was given a portion of the income and, therefore, the settlement came within the exception to s. 21 of the Transfer of Property Act. In the settlement there is no direction for the whole or any portion of the income being given for the maintenance of Swaminathan during his minority and, therefore, it is unnecessary to consider the cases relied upon by him, *Pearson* v. *Dolman* (5) and *In re Holt's Estate*, *Bolding* v. *Strugnell* (6). Where any

(1) 28 C. 621; 28 I. A. 159; 5 C. W. N. 729; 3 Bom. L. R. 808; 8 Sar. P. C. J. 92 (P. C.).

(2) 4 M. 124; 6 Ind. Jur. 18; 1 Ind. Dec. (N. S.) 921.

(3) 8 C. 378; 10 C. L. R. 207; 4 Shome L. R. 220; 6 Ind. Jur. 467; 4 Ind. Dec. (N. S.) 242.

(4) (1905) 2 Ch. 295; 74 L. J. Ch. 487; 53 W. R. 571; 93 L. T. 132.

(5) (1867) 3 Eq. 315; 36 L. J. Ch. 258; 15 W. R. 120.

(6) (1876) 45 L. J. Ch. 208; 34 L. T. 120; 24 W. R. 339.

portion of the income is given to the legatee no doubt the principle of exception to s. 21 would apply. It is unnecessary in the view I have taken to consider the effect of Ex. IV and it is not contended for the respondent that the settlor had a right to make a fresh settlement.

Clause 3 of the Will relates to the management of charities. Swaminathan having died and there being no provision in Ex. A for his heirs conducting the charity the plaintiff is not entitled to succeed so far as the management of the charity properties are concerned.

Mr. Varadachariar suggested that in case the appeal is allowed, certain modifications should be made in the decree inasmuch as all the properties mentioned in B Schedule were decreed to the plaintiff by the first Court. The decree of the Subordinate Judge will be restored by omitting such shares of his property as has been excluded in Ex. B.

In the result the appeal is allowed and the decree of the District Judge is set aside and that of the Subordinate Judge restored with the modifications mentioned above. The appellant will be entitled to his costs in this Court and in the lower Appellate Court.

V. N. V. *Appeal allowed.*

OUDH CHIEF COURT.

MISCELLANEOUS APPEAL No. 41 OF 1926.

December 3, 1926.

Present:—Mr. Justice Misra and Mr. Justice Raza.

BHAGWAN SINGH AND ANOTHER —APPLICANTS—APPELLANTS

versus

CHEDILAL *Amin* OF A FIRM MAKHDOOM RAM-CHEDI LALL—OPPOSITE PARTY —RESPONDENT.

Provincial Insolvency Act (V of 1920), s. 35—Payment of some debts by insolvent—Order of annulment, validity of.

A District Judge has no jurisdiction to pass an order of annulment of adjudication under s. 35 of the Provincial Insolvency Act until all the debts due from the insolvent have been paid off. [p. 278, col. 1.]

Miscellaneous appeal against an order of the District Judge, Fyzabad, dated the 3rd September, 1926.

Messrs. *Niamatullah* and *Naimullah*, for the Appellants.

JUDGMENT.—This is an appeal arising out of insolvency proceedings taken under the Provincial Insolvency Act, V of 1920. The facts of the case are as follows:—

On the 24th August, 1925. the Ajudhya Bank applied to the Court of the District Judge, Fyzabad, that one Chhedi Lal, respondent in the present appeal, should be adjudged insolvent inasmuch, as he owed a sum of Rs. 800 to the Bank and had not been able to pay it off. On the 16th September, 1925, the appellants Bhagwan Deen Singh and Mangal Singh also filed a similar application in the same Court for getting the respondent similarly adjudged. On the 9th October, 1925, the learned District Judge of Fyzabad granted the application of the Bank and passed the order of adjudication against the respondent. On the 16th October, 1925, the learned Judge took up the application of the appellants and passed an order to the effect that the respondent had already been adjudged insolvent in the proceedings taken by the Bank and it was not, therefore, necessary to pass a further order of adjudication on the application filed by the appellants. He, however, directed them to prove their debts in the proceedings taken by the Ajudhya Bank and to get themselves entered as creditors in the schedule of creditors to be prepared in the case started by the Bank. It appears that on the 6th October, 1925, the date when the adjudication order was passed by the learned Judge, no enquiry as to the debts of various creditors had been made and no proceedings seem to have been taken beyond the appointment of one Babu Ram Kishan, Pleader, as a Receiver in the case. It also appears from the record that after the passing of adjudication order the learned Judge did not fix any date on which the various creditors including the appellants could prove their respective debts. Nothing seems to have been done in the case for about a year. On the 15th July, 1926, Ajudhya Bank applied to the learned Judge stating that the debt due from the respondent to the Bank had been paid off and that the order of adjudication should be annulled under s. 35 of the Insolvency Act. The learned Judge without making any enquiry as to whether other debts had been paid off or not granted the application of the Bank, and passed the order of annulment on the 17th July, 1926. On the 23rd July, 1926, the appellants entered into a protest which was overruled and

the application of the appellants for setting aside the order of annulment was rejected on the 23rd September, 1926.

The appellants, who are admittedly some of the creditors of the respondent, have come to this Court in appeal under s. 75 of the Provincial Insolvency Act, which provides for an appeal against an order of annulment. The contention put forward by the learned Advocate for the appellants before us is to the effect that in view of the term of s. 35 of the Provincial Insolvency Act V of 1920, the order of annulment passed by the learned Judge is wrong. In our opinion this contention seems to be well-founded. Section 35 of the said Act runs as follows. "Where, in the opinion of the Court, a debtor ought not to have been adjudged insolvent, or where it is proved to the satisfaction of the Court that the debts of the insolvent have been paid in full, the Court shall, on the application of the debtor, or of any other person interested, by order in writing annul the adjudication."

It will appear from the provisions of the section quoted above that the learned District Judge had no jurisdiction to pass an order of annulment of adjudication until *all* the debts due from the insolvent had been paid off. The reason for the rule is not far to seek. It is clear that if the insolvent has really paid off all his debts there is no reason why he should remain insolvent any longer. We find it to be clear from the record of the case that the debt due to only one creditor, namely, Ajudhya Bank, had been paid off and the debts due to the other creditors were still unpaid. Under the circumstances we regret we cannot uphold the order of annulment passed by the learned Judge.

We, therefore, set aside the order of annulment passed by the learned Judge on the 26th July, 1926, and also the order passed by him on the 23rd September, 1926, and direct him to continue proceedings under the Insolvency Act, if the appellants desire him to do so. The respondent has not appeared to contest the appeal and we do not, therefore, propose making any order as to costs.

G. H. *Appeal allowed.*

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 81 OF 1924.

August 26, 1925.

Present:—Sir Victor Murray Coutts Trotter, KT., Chief Justice, and Mr. Justice Viswanatha Sastri.

MESSRS. M. V. KRISHNA IYER AND SONS—PLAINTIFFS—APPELLANTS

versus

MESSRS. WILLIAM C. YUILLE & Co., LTD.—DEFENDANTS—RESPONDENTS.

Contract—Privity—Contract for purchase of goods from London through Madras firm—Payment of advance by ultimate purchaser—Contract by intermediary on his own behalf—Non-delivery of goods—Suit for refund—Privity of contract.

The plaintiffs, a firm trading at Kumbakonam, entered into negotiations with a firm at Madras for the purchase of sheets of yellow metal from Y. and Co., in London and a sum of Rs. 5,000 was paid as advance. The firm at Madras entered into the contract of sale with the Company at London on their own behalf and there was no offer or acceptance as between the plaintiffs and the English firm at London. The goods not having been delivered the plaintiffs sued to recover the advance amount from the English firm at London :

Held, (1) that there was no privity of contract between the plaintiffs and the London firm ; [p. 280, cols. 1 & 2.]

(2) that as between the Madras and London firms the monies were paid by the Madras firm as their own monies in discharge of their own debt, and the fact that the ultimate source was the plaintiffs had no effect upon the legal position of the parties ; [p. 280, col. 2.]

(3) that the plaintiffs had no cause of action against the London firm. [*ibid.*]

Appeal from the judgment of Mr. Justice Beasley, dated the 28th October, 1924, passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C. S. No. 370 of 1922.

Mr. *V. Radha Krishnayya*, for the Appellants.

Messrs. *Morseby* and *Taylor*, for the Respondents.

JUDGMENT.

Coutts Trotter, C. J.—The plaintiffs in this case are a firm trading under the name and style of M. V. Krishna Iyer and Sons at Kumbakonam. The defendants are (1) Messrs. William C. Yuille & Co., Ltd., carrying on business, as merchants in Glasgow and (2) the Indian Trading Co., who carried on business in Madras and acted as intermediators between the plaintiffs and Messrs. William C. Yuille & Co., Ltd. The suit is brought by the plaintiffs for the return of certain advances amounting in all to Rs. 5,000 together with interest made by them by way of deposit in respect of three contracts for the purchase by them

of sheets of yellow metal. No question arises as to the liability in one form or another of the Indian Trading Co., but they have disappeared and no money is recoverable from them and the plaintiffs, therefore, seek to affix liability upon the first defendants Messrs. William C. Yuille and Co., Ltd. The course of business is shown in the documents and neither side thought it worthwhile to call oral evidence at the trial. The first material document is an indent Ex. A, dated 28th June, 1921, from the plaintiffs at Kumbakonam to the Indian Trading Company at Madras. The opening sentence is as follows:—"We hereby request you to instruct your agents or suppliers to purchase for us the undermentioned goods on our account and risk upon the terms stated below." That appears to be in terms a request to the Indian Trading Co., to get their suppliers or agents who must be taken for the purposes of this case to be William C. Yuille Co., Ltd., to bring about a binding contract between the plaintiffs and Messrs. M. V. Krishna Iyer and Sons of the one part, and some supplier or manufacturer of yellow metal in England or Scotland, of the other. The terms of the document might lend colour to the inference that in spite of the opening clause what was really intended to be effected was a contract between M. V. Krishna Iyer and Sons and the Indian Trading Co., a contract, I mean, not merely of agency but of purchase and sale of goods. What happened was that on the 30th of June, 1921, the Indian Trading Co., wrote to Messrs. William C. Yuille Co., Ltd., at Glasgow an order (Ex. D-3) of which the following are the material terms, "Please supply us the following as per instructions hereunder." Then follows a specification for assorted sizes of yellow metal sheets amounting in all to $10\frac{1}{2}$ tons. The document contains a provision that the draft is to be drawn against M. V. Krishna Iyer and Sons of Kumbakonam and a proviso that the Indian Trading Co.'s commission of $2\frac{1}{2}$ per cent. and the advances contemplated to be made by M. V. Krishna Iyer and Co., should be deducted by the Bank at the time of meeting the draft. On 11th July, 1921, Ex. C-1, the Indian Trading Co., informed M. V. Krishna Iyer and Sons that they had heard by cable that the indent for $10\frac{1}{2}$ tons had been accepted. There is no trace of this cable and in view of the circumstances appearing in the letter correspondence, it seems clear that that statement was untrue. In Ex. D-4, dated 14th July, 1921, the Indian Trading Co., wrote to Messrs. C. Yuille and Co., Ltd., a letter in which they state: "We have asked you to ship us continental sheets at £90 per ton" which, of course, lends colour to the suggestion that the Indian Trading Co., were purporting to buy as principal goods direct from William C. Yuille Co., Ltd. On 15th of August, 1921, a cable was sent by William C. Yuille Co., Ltd., to the Indian Trading Co. in the following terms "We can now accept your order yellow metal sheets No. 9 against payment of £200." Indent No. 9 is the indent which had been signed by the plaintiffs and forwarded to the Indian Trading Co. and by them to Messrs. William C. Yuille Co., Ltd. In due course of time, under the first contract, there arrived a sale-note Ex. B-8, dated 31st August, 1921, which is addressed by W. C. Yuille Co., Ltd., to Messrs. M. V. Krishna Iyer and Sons per Messrs. Indian Trading Co. It refers us in terms to indent No. 9 and to an order quoted as No. B181 which apparently has been lost during the course of the case and is not forthcoming. The other document states, "We beg to confirm having sold you to-day the undernoted goods" and then follows a description of the $10\frac{1}{2}$ tons yellow metal sheets. The document was sent by William C. Yuille Ltd., to the Indian Trading Co. with a covering letter Ex. D-9, dated the 31st August in which they say, "We have yours of 30th June confirming the cablegram sent to us offering order for 10 tons 30/60 lbs. yellow metal sheets and send you herewith our sale-note in duplicate copy of which please hand to your clients." The copy was duly sent by the Indian Trading Co., to the plaintiffs.

The learned Judge has found that the Indian Trading Co. were agents of the plaintiffs, and that whatever their obligations might be as such agents, they failed to establish privity of contract between the plaintiffs and Messrs. William C. Yuille and Co., Ltd. There are three possibilities, (1) that there was a contract of sale between the plaintiffs and William C. Yuille and Co., Ltd., (2) that there was no concluded contract between them at all but William C. Yuille and Co., Ltd., have had the benefit of the money paid to them by the plaintiffs by way of advances to Indian Trading Co., and admittedly remitted by them to William C. Yuille and Co.

Ltd., and (3) that, whatever, their instructions, what in fact the Indian Trading Co. did was to effect a binding contract of sale between themselves of the one part and Messrs. William C. Yuille and Co, Ltd., of the other. If that last hypothesis be correct, it is hardly disputed that the learned Judge's conclusion was right and that the plaintiffs have no remedy against Messrs. William C Yuille and Co., Ltd. There is no doubt that the sale-note of 31st August, Ex. B-1, points strongly to the view that Messrs. William C. Yuille and Co, Ltd., imagined themselves to be concluding a binding contract with the plaintiffs. The difficulty in that view is that treating that letter as an acceptance there is no offer to which it can be referred, because, the only offer from the plaintiffs is that contained in the indent-note and that was an offer not to enter into a contract either with the Indian Trading Co., or their agents Messrs. William C. Yuille and Co., Ltd., but with the ultimate manufacturer or supplier of the goods. If the matter stood there, the right conclusion might seem to be that there was no contract and that Messrs. William C. Yuille and Co., Ltd., having received monies which, undoubtedly, emanated from the plaintiffs on the basis of a non-existent contract were bound in equity to refund such monies to the plaintiffs as monies had and received to their use, it being practically undisputed that yellow metal sheets were not delivered in accordance with the obligations outlined either in the indent-note or sale-note. My own view is that, whatever, the instructions given to the Indian Trading Co., by plaintiffs, and, however culpably they neglected the tenor of those instructions, what in fact they did was to make a binding contract of sale between themselves of the one part and Messrs. William C. Yuille and Co., Ltd., of the other and that appears to me to be contained, as to the offer, in the letter of the 30th June, 1921, Ex. D-3 and as to the acceptance, in the telegram of the 15th August, 1921, (Ex. D) sent to the Indian Trading Co. If that be the correct view, it is immaterial that Messrs. William C. Yuille and Co., Ltd., in Ex. B-1 a fortnight later, on the 31st August endeavoured to create evidence that there was a contract between themselves and the plaintiffs. That being so, the findings of the learned Judge that there was no privity of contract between the plaintiffs and William C. Yuille and Co., Ltd. is correct and this suit must fail. It becomes immaterial to consider whether the Indian Trading Co., were the agents of the plaintiffs or William C. Yuille and Co., Ltd. or of both. The decision of Macleod, J., in *Mahomed Ally Ebrahim Pir Khan* v. *Schiller, Dosogni & Co.* (1) has no bearing on the present case. We are of opinion that the plaintiffs have failed to establish that there was any contract relation between themselves and William C. Yuille and Co., Ltd., which would enable them to sue that firm for the monies which they handed over to the Indian Trading Co. As between the Indian Trading Co. and William C. Yuille and Co., Ltd., these monies were paid by the Indian Trading Co. as their own monies in discharge of their own debt, and the fact that the ultimate source was the plaintiffs has no effect upon the legal position of the parties.

The result is that the appeal must be dismissed with costs.

Viswanatha Sastri, J.—I agree with my Lord.

V. N. V. *Appeal dismissed.*

(1) 13 B. 470; Chitty's S. C. C. R. 216; 7 Ind. Dec. (N S.) 312.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 459 OF 1924.

November 12, 1926.

Present :— Mr. Justice Iqbal Ahmad.

Sheikh MUNAWAR ALI—

PLAINTIFF—APPELLANT

versus

JAGMILAN RAM AND OTHERS—

DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), s. 3, Sch. I, Arts. 134, 144, 148—Mortgage—Sub-mortgage—Transferee from sub-mortgagee, position of—Redemption—Limitation—Adverse possession—Appeal, second—Limitation, plea of, whether can be raised for first time.

A mortgagor is ordinarily allowed a period of 60 years to redeem a mortgage by Art. 148 of Sch. I to the Limitation Act and any person, who seeks the protection of Art. 134 of Sch. I, must bring his case strictly within that Article. That Article applies only to cases where a transferee for value from a mortgagee takes that which is *de facto* a mortgage upon a representation made to him and in the full belief that it is not a mortgage but an absolute title. It cannot, protect persons who are not transferees from the mortgagee but are transferees from persons other than the mortgagee or his heirs, for instance, from a sub-mortgagee. A transferee from a sub-mortgagee,

however, may be able to avail himself of the benefit of Art. 144 of Sch. I to the Limitation Act if the conditions laid down in that Article are fulfilled. [p. 282, col. 2.]

A question of limitation raised for the first time in second appeal may be entertained where there is no dispute as to the facts. [p. 283, col. 2.]

Second appeal from a decree of the District Judge, Ghazipur, dated the 8th December, 1923.

Mr. *K. Verma*, for the Appellant.

Mr. *U. S. Bajpai*, for the Respondents.

JUDGMENT.—This is a plaintiff's appeal and arises out of a suit for redemption of a mortgage dated the 29th of July, 1862, executed by *Musammat* Ulfat Bibi, predecessor-in-title of the plaintiff in favour of Sabut Kunwar and Ram Phal Kunwar, predecessors-in-interest of the defendants, first party.

By the said mortgage houses Nos. 80 and 148 situate in the town of Saidpur were mortgaged for a sum of Rs. 340. The plaintiff's case was that the principal mortgage-money together with interest thereon at the stipulated rate had been satisfied from the rent of the houses mortgaged, and as such the plaintiff was entitled to a decree for redemption of the said mortgage without payment of any amount, and was over and above that entitled to a decree for the surplus amount that may have been realised by the persons in possession of the mortgaged property after liquidation of the mortgage-debt.

It is common ground that defendant No. 4 was in possession of house No. 80 and defendants Nos. 5, 6 and 7 were in possession of house No. 148 from a time long before the institution of the suit, and the plaintiff's case was that the said defendants were in possession as sub-mortgagees, and the original mortgage-debt having been satisfied, they were not entitled to resist the suit for redemption.

The suit was contested by defendants Nos. 1 to 3, the successors-in-interest of the mortgagees, and by defendants Nos. 5 and 6 and defendant No. 4.

I am not concerned with the defence of defendants Nos. 1 to 3 in the present appeal.

The defence of defendants Nos. 5 and 6 was that they were in possession of house No. 148 as sub-mortgagees, under an unregistered deed of sub-mortgage executed by the defendants, first party for a sum of Rs. 150 and had further spent Rs. 160 in making necessary repairs of the house, and as such the plaintiff was in no case entitled to a decree for redemption of house No. 148 unless and until he paid to the said defendants the sum of Rs. 310. The defence of defendant No. 4 was that he was in possession of house No. 80 as mortgagee under a deed dated the 25th of December, 1903, executed by two persons named Ganesh Ram and Suraj Prasad, who were in adverse proprietary possession of house No. 80 for a period of more than 12 years prior to the date of the execution of the mortgage by them, and as such the plaintiff's suit was barred by 12 years' rule of limitation. It was further urged by defendant No. 4 that he had spent a sum of Rs. 1,500 in re-constructing the house now in existence, and that having regard to the terms of the mortgage-deed, executed by Ganesh Ram and Suraj Prasad, he was in any case entitled to a sum of Rs. 7,480-1-6 as a condition precedent to the redemption of the mortgage.

The trial Court overruled the pleas taken in defence by all the defendants, and passed a decree for redemption of the mortgage, in the plaintiff's favour, conditional on the payment of Rs. 340 the original mortgage-money, to the defendants, first party by the plaintiff.

Only defendant No. 4 filed an appeal against the decree of the trial Court and in that appeal he arrayed, as respondents, not only the plaintiff but the remaining defendants to the suit. The lower Appellate Court held that the suit was barred by Art. 134 of the Limitation Act and as such allowed the appeal filed by defendant No. 4. The decree of the lower Appellate Court directs the dismissal of the claim not only in respect of house No. 80 but in respect of house No. 148 as well.

It is clear that the decree of the lower Appellate Court, so far as it relates to house No. 148, cannot be sustained. The defence of defendants Nos. 5 and 6 with respect to house No. 148 was not that the plaintiff-appellant had lost his right to that house by lapse of time, but was only to the effect, that the plaintiff could not ignore the sub-mortgage executed in favour of those defendants, and was bound to pay a sum of Rs. 310 as a condition precedent to the redemption of the mortgage. In short, the defence of defendants Nos. 5 and 6 was not identical with the defence of defendant No. 4. Nor did the judgment of the trial Court proceed on any ground com-

mon to defendants Nos. 5, 6 and 7 and to defendant No. 4, and as such the lower Appellate Court could in no case, on appeal by defendant No. 4 alone, reverse the decree of the trial Court in favour of all the defendants, in accordance with the provisions of O. XLI, r. 4 of the C. P. C. As a matter of fact, a perusal of the judgment of the lower Appellate Court leaves no room for doubt, that that Court only confined its attention to house No. 80 and did not adjudicate about the rights of the plaintiff-appellant with respect to house No. 148. For these reasons the decree of the lower Appellate Court with respect to house No. 148 will have to be restored.

Now I proceed to consider the defence raised by defendant No. 4 with respect to house No. 80. It is admitted that Doolam Singh and Bechan Singh heirs of the original mortgagees executed a sub-mortgage of house No. 80 in favour of Sahodra Kunwar wife of Bishnath *halwai* on the 12th of May 1886. Thereafter on the 3rd of August, 1888, the aforesaid sub-mortgagees executed a mortgage by conditional sale in favour of Musai Ram and Gaya Prasad, and for the purposes of this appeal I will assume in favour of defendant No. 4 that the sub-mortgagees professed to be absolute owners of the house, when mortgaging the same to Musai Ram and Gaya Prasad. Musai Ram and Gaya Prasad put their mortgage into suit and obtained a decree for foreclosure on the 4th of August, 1893, and I agree with the learned Counsel for the respondents that the decree, as drawn up, provides for foreclosure not of sub-mortgagee rights but of full proprietary rights in the house. On the 26th of March, 1896, Musai Ram and Gaya Prasad sold their rights under the decree to one Suraj Prasad son of Ganesh Ram who entered into possession of the house Then on the 25th of December, 1903, Suraj Prasad and his father Ganesh Ram executed a mortgage-deed in respect of the said house in favour of Ram Prasad father of defendant No. 4, representing themselves to be the full owners of the house.

The case of defendant No. 4 was that time began to run against the plaintiff-appellant from the 3rd of August 1888 when Bishnath and Sahodra Kunwar, the sub-mortgagees, professing to be the absolute owners mortgaged the house to Musai Ram and Gaya Prasad for a valuable consideration, and that in any case a cause of action for recovery of possession of the house accrued to the plaintiff on the 4th of August, 1893, when the foreclosure decree referred to above was passed, and the suit not having been instituted within 12 years of either of those dates was time-barred.

The trial Court held that it was conclusively proved that Ram Prasad and after him defendant No. 4 had been in possession of house No. 80 since 1903, and that the effect of the foreclosure decree was simply to convey to Gaya Prasad and Musai Ram the rights and interest of *Musammat* Sahodra Kunwar and Bishnath *halwai* as sub-mortgagees, and that there was no substance in the plea of adverse possession raised by defendant No. 4. The lower Appellate Court was of opinion, that a perusal of the record of the foreclosure suit of 1913, left no room for doubt, that the decree in that case in favour of the mortgagees was "for recovery of proprietary possession of a house by extinction of the defendants' right to redeem" and that the proprietary rights, which were rightly or wrongly given to the mortgagees by the decree of 1893, were the rights transferred to Suraj Prasad in 1896,and thereafter he had full proprietary right in house No. 80 that was mortgaged by Suraj Prasad and Ganesh Ram to Ram Prasad father of defendant No. 4 holding this view, that Court came to the conclusion that the plaintiff's suit was barred by Art. 134 of the Limitation Act.

I am unable to agree with the lower Appellate Court as to the applicability of Art. 134 to the present case. Article 134 is limited to cases where the property mortgaged has been transferred by the mortgagee for a valuable consideration. That Article applies only to cases where a transferee for value from a mortgagee, takes that which is *de facto* a mortgage upon a representation made to him and in the full belief that it is not a mortgage but an absolute title. That Article, in my opinion, cannot protect persons who are not transferees from the mortgagee but are transferees from persons other than the mortgagees or their heirs. The mortgagor is ordinarily allowed a period of 60 years to redeem a mortgage by Art. 148 of the First Schedule to the Limitation Act and any person who seeks the protection of Art. 134 must strictly bring his case within that Article. If one were to extend the operation of Art. 134 to cases of transfers by sub-mortgagees one would have to

read into the Article, words to the effect "property transferred by the mortgagee or by a transferee from the mortgagee" words which are not to be found in Art. 134. To me there appears to be no warrant for so extending the scope of Art. 134 of the Limitation Act. This view is in accord with the observations of the learned Judicial Commissioner of Oudh to be found in the case of *Chhoti Begam* v. *Ram Prasad* (1). In the present case, it is admitted on all hands, that by the sub-mortgage executed by Doolam Singh and Bechan Singh in 1886, all that was mortgaged to Sahodra Kunwar was the mortgagee right and not absolute right in the house, and as such so far as the transfer of 1886 is concerned, it cannot attract the provisions of Art. 134 of the Limitation Act. In the view that I take of the true construction of Art. 134, the subsequent transfers made by the sub-mortgagees, or the decrees obtained on the basis of the mortgage by conditional sale executed by the sub-mortgagees, or the tranfers made by the successors-in-title of the decree-holders, cannot curtail the ordinary period of limitation of 60 years provided for by Art. 148, and those transfers and decrees were, in my opinion, absolutely ineffectual to determine the plaintiff's right to redeem the mortgage within the period allowed by law.

For the reasons given above I am of opinion that the lower Appellate Court was wrong in holding that the suit of the plaintiff-appellant with respect to house No. 80 was barred by Art. 134 of the First Schedule to the Limitation Act.

But the decree of the lower Appellate Court is supported yet on another ground by the learned Counsel for the respondents. He argues that even if Art. 134 be not applicable to the facts of the present case the plaintiff's suit was barred by Art. 144 of the Limitation Act. The learned Counsel for the appellant maintains in the first place, that this plea not having been definitely raised in either of the Courts below, I ought not to entertain it in second appeal, and, secondly, that Art 144 has no application.

As there is no controversy about the facts and the question raised by the learned Counsel for the respondents is purely one of law, I am of opinion that having regard to the provisions of s. 3 of the Limitation Act, I must entertain the ground now urged, by the learned Counsel for the respondents, in support of the decree of the lower Appellate Court and as such I must proceed to consider as to whether or not the plaintiff's suit was barred by Art. 144 of the Limitation Act.

If the point was not covered by authority, and if I had to decide the point on a consideration of the relevant Articles in the First Schedule to the Limitation Act, I would have considerable hesitation in holding that Art. 144 constitutes a bar to the plaintiff's claim. Article 144 is confined to suits "for possession of immoveable property " and as such would apparently have no application to a suit for redemption of a mortgage. True it is that a decree for redemption of a mortgage does entitle the mortgagor to possession of the property mortgaged, but even then it cannot be said that a suit for redemption of a mortgage is a suit for possession of immoveable property pure and simple. Moreover, Art. 144 is restricted to those suits for possession of immoveable property that have not been "otherwise specifically provided for in the First Schedule to the Limitation Act." Even if a decree for redemption of a mortgage be regarded as a decree for possession of immoveable property, Art. 144 can have no application to a suit for redemption inasmuch as there is a distinct Article, *viz.*, Article 148 that makes provision with respect to such suits.

Further a consideration of Art. 148 and Art. 134 leads me to a conclusion, that the only duty cast upon a mortgagee, in order to keep intact his equity of redemption, is to jealously watch the activities of his mortgagee alone; in other words he has to keep an eye on the quantity of the interest conveyed by his mortgagee to third persons, and if the mortgagee has professed to transfer an absolute title he must bring his suit within 12 years of the date of the transfer by the mortgagee. If he fails to do, his right of redemption will be gone after the lapse of 12 years from the date of the transfer by the mortgagee.

It is well-settled that "possession of mortgaged property obtained by ouster of a mortgagee in possession is not necessarily adverse to the mortgagor also, for the reason that such possession, so far as the mortgagor is concerned, cannot become adverse until the mortgagor becomes entitled to immediate possession [*vide*

(1) 39 Ind. Cas. 582; 20 O. C. 164.

Muhammad Husain v. *Mulchand* (2) and *Ismdar Khan* v. *Ahmad Hussain* (3)]. If a person holding adversely to the mortgagee cannot prescribe a title to the equity of redemption as against the mortgagor, I find it difficult to hold that a person holding possession of the mortgaged property not adversely to the mortgagee, but claiming title through a transfer made by some transferee from the mortgagee, can prescribe a title by adverse possession. So long as the mortgagor does not become entitled to immediate possession of the mortgaged property, it appears to me, it cannot be said that the person in possession of the mortgaged property, is holding adversely to the mortgagor, for the simple reason that possession can be adverse only against the person, who is entitled to the possession of that property. True it is that if a trespasser dispossesses a mortgagee and enters into possession of the mortgaged property asserting a title adverse to the mortgagor also, his title will be adverse to the mortgagor from the time, the mortgagor has knowledge of the assertion. This was the view taken in the case of *Saiduddin Khan* v. *Ratan Lal* (4) and *Peria Auja Ambalam* v. *Shunmugasundaram* (5). But in the present case there is nothing to show that an assertion of an adverse title was made either by defendant No. 4 or his predecessor-in-title to the knowledge of the plaintiff or his predecessor-in-title. If I was untrammelled by authority, I would be inclined to the view that the plea of adverse possession based on Art. 144 of the Limitation Act must yield to the proposition of law enunciated in the cases of *Muhammad Husain* v. *Mul Chand* (2) and *Ismdar Khan* v. *Ahmad Hussain* (3).

But notwithstanding all that I have said above, it seems to me that the case is covered by a Division Bench ruling of this Court reported as *Ram Piari* v. *Budhsain* (6). That case is on all fours with the present case and it has been definitely laid down in that case that the claim for redemption, in circumstances like those of the present case, is barred by Art. 144 of the Limitation Act. I am bound by the decision last quoted and as such I must hold, that the ground raised by the learned Counsel for the respondents, in support of the decree of the lower Appellate Court, is well-founded and that the plaintiff's claim with respect to house No. 80 was barred by limitation.

The result is that I modify the decree of the lower Appellate Court by granting a decree to the plaintiff-appellant with respect to house No. 148 conditional on the payment of Rs. 340 to the defendants within six months from the date of the decree of this Court. The decree of the lower Appellate Court dismissing the claim with respect to house No. 80 is upheld.

As the lower Appellate Court has, because of the peculiar circumstances of the case, ordered the parties to bear their own costs, I think I ought not to depart from the course adopted by that Court in the matter of costs. Accordingly I direct that the parties should bear their own costs in all Courts.

Z. K. *Decree modified.*

(2) 27 A. 395; A. W. N. (1905) 4.
(3) 30 A. 119; A. W. N. (1908) 25; 5 A. L. J. 85; 3 M. L. T. 125.
(4) 5 Ind. Cas. 123; 7 A. L. J. 95; 32 A. 160.
(5) 22 Ind. Cas. 615; 38 M. 903; 15 M. L. T. 112; 26 M. L. J. 140; 1 L. W. 119; (1914) M. W. N. 417.
(6) 61 Ind. Cas. 546; 43 A. 164; 18 A. L. J. 995; 2 U. P. L. R. (A.) 332.

MADRAS HIGH COURT.

APPEAL SUIT No. 15 OF 1926.
August 27, 1926.
Present:—Mr. Justice Ramesam and Mr. Justice Reilly.

K. R. MUTHU A. R. ARUNACHALAM CHETTY—PLAINTIFF—APPELLANT
versus
DAVID, AND OTHERS—DEFENDANTS—RESPONDENTS.

C. P. C. (Act V of 1908), s. 80—Suit for injunction restraining Official Receiver from selling property—Notice, whether necessary.

In respect of acts of public servants done in their official capacity, s. 80, C. P. C., applies only in the case of past acts completed or begun but incomplete, and not to threatened acts. A suit for an injunction restraining an Official Receiver from selling certain properties is, therefore, not unsustainable for want of notice under s. 80, C. P. C. [p. 286, col. 2.]

Superintending Engineer, Bezwada v. *Chitturi Ramakrishnayya* (8), considered.

Muradally Shamji v. *Long* (2), *Bhagchand Dagadusha* v. *Secretary of State for India* (7), *Secretary of State for India* v. *Gulam Rasul* (6) and *Naginlal Chunilal* v. *Official Assignee of Bombay* (4), followed.

Per *Ramesam, J.*—The whole phrase "an act purporting to be done" in s 80, C. P. C., would ordinarily refer to past acts whether finished or begun but incomplete and not to future acts. [p. 285, col. 2.]

Per *Reilly, J.*—When a provision of a Statute is susceptible of two interpretations and one of them

leads to a manifest absurdity or to a clear risk of injustice and the other leads to no such consequences, the latter interpretation must be adopted. [p. 287, col. 2.]

So far as it is concerned with suits against Public Officers, s. 80, C. P. C., is a provision restricting the ordinary right of every man to come to the Civil Courts for relief and must, therefore, be interpreted with the utmost strictness. [p. 287, col. 2]

The words 'in respect of any act purporting to be done by such public officer in his official capacity' in s. 80, C. P. C., are susceptible of two interpretations, a wider interpretation including future acts and a narrower confined to past acts; but the narrower interpretation is the correct one. [p. 287, col. 1.]

Appeal against a decree of the Court of the Subordinate Judge, Sivaganga, in O. S. No. 113 of 1924.

Messrs *C. S. Venkatachariar* and *D. Ramasami Iyengar*, for the Appellant.

Mr. *T. M. Krishnaswami Iyer*, for the Respondents.

JUDGMENT.

Ramesam, J.—The plaintiff is the appellant before us. The suit was for a declaration that the suit properties belonged to him and defendants Nos. 3 and 4 and for a perpetual injunction restraining the 1st defendant, who was the Official Receiver of the Ramnad District, from selling them as the properties of the 2nd defendant in Insolvency Petition No. 9 of 1917 on his file. The Official Receiver advertised the suit properties for sale on 10th November, 1924. On the 5th November, the plaintiff sent a notice of suit to the 1st defendant and the suit was filed on the 7th November, 1924. The Subordinate Judge of Sivaganga dismissed the suit on the ground that two months have not elapsed before the filing of the suit and after the giving of notice. The plaintiff in appeal contends that a notice under s. 80, C. P. C., is unnecessary. He concedes that the Official Receiver is a public servant but argues that the suit is not in respect of an act purporting to be done in his official capacity. His argument is that the suit is only in respect of a threatened act and not in respect of an act which was begun, and, therefore, the section does not apply. This contention of the appellant is supported by the decision of the Calcutta High Court in *Ganoda Sundary Chaudhurani* v. *Nalini Ranjan Raha* (1) and other decisions of the Bombay High Court which will be referred to presently. In *Ganoda Sundary Chaudhurani* v. *Nalini Ranjan Raha* (1) Woodroffe, J., relies on the word 'done,' but I am not satisfied with this line of reasoning. The phrase is not 'an act done' but 'an act purporting to be done' and the words 'to be done' are not inconsistent with a future act. It is possible to describe a future act by a phrase using the words 'purporting to be done' by using other appropriate words such as "future" or "intended" indicating that a future act was meant or by the mere use of the future tense in the sentence. As Pratt, J., points out in *Muradally Shamji* v. *Long* (2), one mode of indicating past acts only is by using the words 'purporting to have been done. The phrase "purporting to be done" uses the present indefinite form and is grammatically wider than the phrase 'purporting to have been done'. While conceding all this I am still of opinion that as a matter of an ordinary idiom, the whole phrase 'an act purporting to be done' would ordinarily refer to past acts only whether finished or begun but incomplete and does not refer to future acts. The use of the perfect form is not ordinarily resorted to for describing past acts though grammatically more accurate and if a future act is meant it is expressly described by appropriate words. Where no such words are used, the phrase ought, in my opinion, to be ordinarily limited to past acts (unless the context requires one to extend it to future acts also there being no grammatical impediment to doing so)—as a matter of reasonable construction if not of grammatical necessity. The decision in *Secretary of State for India* v. *Gajanan Krishna* (3) relates to a suit against the Secretary of State. In *Naginlal Chunilal* v. *Official Assignee of Bombay* (4) where the suit was against the Official Assignee of Bombay the Judges followed the decision of Cunningham, J., in *Shahebzadee Shahunshah Begam* v. *Fergusson* (5). Though I come to the same conclusion I do not wish to adopt that line of reasoning. The decision in *Naginlal Chunilal* v. *Official Assignee of Bombay* (4) was followed in the case of *Secretary of State for India* v. *Gulam Rasul* (6). In *Muradally Shamji* v. *Long* (2), Pratt, J., while differing from the above cases was merely content to follow them sitting as a single Judge. In *Bhagchand Dagadusha* v. *Secretary of State for India* (7), Kemp, J., observed: "The suit is in respect of something the 2nd respondent is going to do,

(1) 1 Ind. Cas. 514; 36 C. 28; 12 C. W. N. 1065.

(2) 53 Ind. Cas. 627; 44 B. 555 at p. 560; 21 Bom. L. R. 980.

(3) 10 Ind. Cas. 639; 35 B. 362; 13 Bom. L. R. 273.

(4) 17 Ind. Cas. 876; 37 B. 243; 14 Bom. L. R. 1148.

(5) 7 C. 499; 3 Ind. Dec. (N. S) 871.

(6) 34 Ind. Cas. 535; 40 B. 392; 18 Bom. L. R. 243.

(7) 90 Ind. Cas. 13; 48 B. 87 at p. 153; A. I. R. 1924 Bom. 1; 26 Bom. L. R. 1.

not in respect of something he has done..... In my opinion, therefore, no notice is necessary so far as the suit is one for an injunction against the 2nd defendant." The only Madras decision which touches the question is *Superintending Engineer, Bezwada* v. *Chitturi Ramakrishnayyar* (8). In that case, the suit was against the Superintending Engineer of Kistna District, and both the learned Judges held that the suit was bad for want of a proper notice on the ground that the suit related to a past act, the act being the order of the Engineer directing the removal of the image of the temple. There was considerable discussion in the judgments as to whether an order which states an intention would be an act and both the learned Judges held it would be. Spencer, J., decided the case on another ground and referred to the want of a proper notice only as an additional ground, but Sadasiva, Iyer, J., rested his judgment solely with reference to s. 80, C. P. C. It does not appear that the point whether the phrase "an act purporting to be done, etc.," includes future act was raised by the Vakil for the respondent. At any rate, it is not discussed in the judgment and, therefore, the judgment is not against the view I am taking. The fact remains that there is no decision against the view I am taking and there are several agreeing with it though on different lines of reasoning.

The learned Vakil for the respondent besides arguing that the section is not confined to past acts only—an argument above dealt with, also argues that this suit must be considered to be in respect of a past act, the past act being the advertisement of the Official Receiver announcing the sale of the suit properties. If the suit can be regarded as one in respect of a past act, the judgment in *Superintending Engineer, Bezwada* v. *Chitturi Ramakrishnayya* (8), already mentioned, supports him. But I find it difficult to hold that the suit is in respect of the advertisement. The reason for the suit, or in other words, the cause of action for the suit may be furnished by the advertisement or some other similar past act of the 1st defendant, but it does not follow that the suit is in respect of that act. The relief sought is to restrain the sale and I think the only proper description of this suit is, "a suit to restrain the intended sale." I am, therefore, unable to accede to the argument of the learned Vakil for the respondent on the second point.

The result is, I hold that in respect of acts of public servants done in their official capacity, the section applies only in the case of past acts completed or begun but incomplete and not to threatened acts and, therefore, the suit is not unsustainable for want of notice. I would, therefore, allow the appeal and remand the case back for disposal according to law. Costs to abide the result. Court-fee paid in appeal will be refunded.

Reilly, J.—Plaintiff instituted a suit for a declaration and for an injunction restraining the Official Receiver of Ramnad from selling the property concerned but did not give the Receiver notice as required by s. 80, C. P. C., two months before presenting his plaint. The question is whether s. 80, C. P. C., prohibits the institution of a suit for an injunction against an Official Receiver, who, it is admitted, is a public officer, unless the notice mentioned in the section has been given to the Receiver two months earlier. It is contended for plaintiff that as regards a public officer, the section requires the notice to be given only if the suit to be brought against him is in respect of some act already done or at least partly accomplished and that, if the suit is in respect of a future act—some threatened, intended, contemplated or apprehended act—that no such notice is required. For defendant, No. 1 it is contended that, if the act in respect of which the suit is brought is the act of a public officer and purports to be done by him in his official capacity, then, whether the act is past, present or future, the suit cannot be instituted unless the notice has been given two months earlier. The question which contention is correct depends on the interpretation of the words "in respect of any act purporting to be done by such public officer in his official capacity" in the section. Do those words cover only a past act or do they include also a future act? On the surface by their mere grammatical form, the words quoted appear to me capable of including a future act. But, when we probe into their meaning, can we say with propriety that an act purports to be done in any particular manner or capacity until it is actually done? We can conceive an imaginary act and conceive it as done in some particular capacity. But can we properly speak of an act not yet done as an act purporting—that is, conveying to the outer world a pretence

(8) 58 Ind. Cas. 885; 39 M. L. J. 151; 12 L. W. 193 (1920) M. W. N. 495; 28 M. L. T. 163.

or profession—to be done in a particular capacity? No doubt, we could do so hypothetically. But, if the dry language of a Statute speaks of an "act purporting so and so" without adding any word to indicate that the expression is intended to include not only acts done but also acts threatened, contemplated or intended, are we at liberty to interpret the expression as including an act not yet done? If the words in question were "in respect of any act done by a public officer in his official capacity," would there be any doubt that they did not include an act not yet done? Does the insertion of the words "purporting to be" not only widen the character of the acts included but also add future acts to past acts. On the other hand, it has been argued for the Official Receiver that, if the Legislature had intended to require previous notice to be given to a public officer only when a suit was to be brought in respect of a past act, it would have been a simple and easy matter to find a form of words which would have made that intention indisputably clear. There is some force in that argument. Without pursuing these questions and considerations further, I think, it may fairly be said that the phrase in question is susceptible of two interpretations, a wider interpretation including future acts and a narrower confined to past acts, and that at the least the narrower interpretation is as consonant with the wording of the section as the wider one. That being so, let us look at the consequences to which the wider interpretation leads. In practice almost all suits against public officers in respect of future acts will be suits for injunctions. Unless a suit for an injunction is to fail entirely of its purpose, it is often necessary that the plaintiff should obtain a temporary injunction pending the suit. Under our procedure a temporary injunction can be obtained only after a suit is instituted. If no suit can be instituted for an injunction against a public officer and no temporary injunction can be obtained against him until two months after notice of the suit has been given, the remedy of injunction against such an officer may often be illusory. Can we suppose that the Legislature intended to deprive a private party of a remedy against a public officer which can be enforced against another private party or to expose a private party to the risk of irreparable damage at the hands of a public officer, though means are provided for guarding against such damage at the hands of another private party? Can we suppose that the Legislature having provided the Courts with the weapon of a temporary injunction for the protection of private rights, intended to tie the hands of the Courts for two months before that weapon may be used against a public officer? This last suggestion at least we cannot accept lightly. It is a well-established rule that, when a provision of a Statute is susceptible of two interpretations and one of them leads to a manifest absurdity or to a clear risk of injustice and the other leads to no such consequences, the second interpretation must be adopted. In my opinion that rule may properly be applied in interpreting the words now in question. I may mention here that Mr. Krishnaswami Iyer for the Official Receiver has pointed out that s. 80 clearly makes notice necessary for every suit against the Secretary of State, whether in respect of past or future acts, and has asked with some dialectical force whether it is reasonable so to interpret the section as to require notice with its attendant danger of irreparable damage to be given before the institution of a suit for an injunction against the Secretary of State but not before the institution of a suit for an injunction against a public officer. I see nothing really unreasonable in supposing that such a distinction was contemplated by the Legislature. Even when a suit is to be brought against the Secretary of State for an injunction, if the protection of a temporary injunction is urgently necessary, the plaintiff can obtain the temporary injunction against the public officer whose immediate act is feared if the section allows him to institute a suit at once against the officer without notice. In practice the immediate protection of a temporary injunction need never be required against the Secretary of State. Finally interpreting the words in question there is one other consideration of great importance. So far as it is concerned with suits against public officers s. 80, C. P. C., is a provision restricting the ordinary right of every man to come to the Civil Courts for relief. It is our duty to interpret such a provision with the utmost strictness, and we must be very sure that our interpretation does not take us one fraction of an inch, one iota, beyond the length to which the language of the provision clear-

ly compels us to go. For these reasons, if the question were bare of authority, I should have no doubt that the correct interpretation of the words in question was the narrower one, *viz.*, that "act" does not include here a future act.

If we turn to cases in which the words in question have been interpreted in this connection, we find that the prevailing view in the Bombay High Court is as shown by *Naginlal Chunilal* v. *Official Assignee of Bombay* (4) and *Bhagchand Dagadusha* v. *Secretary of State for India* (7), that s. 80, C. P. C., does not make previous notice essential for the institution of a suit for an injunction against a public officer in respect of some threatened act. The only cases of the Calcutta High Court to which we have been referred, *viz.*, *Shahebzadee Shahunshah Begum* v. *Fergusson* (5) and *Ganoda Sundary Chaudhurani* v. *Nalini Ranjan Raha* (1), which both dealt with the corresponding section of the Code of 1882, show that according to the view of the learned Judges concerned previous notice is not required before the institution of a suit against a public officer for an injunction. Mr. Krishnaswami Iyer for the Official Receiver relies on *Superintending Engineer, Bezwada* v. *Chitturi Ramakishnayya* (8) the only reported case of this Court in which the question whether s. 80, C. P. C., requires notice to be given before the institution of a suit against a public officer for an injunction appears to have arisen for decision. But in that case, though both the learned Judges found that the suit was bad for want of notice to the officer concerned, they did not explicitly interpret s. 80, as extending to suits against public officers in respect of threatened acts, though that would obviously have been the simplest way to dispose of the case. On the contrary they appear to have based their decision on a finding that the suit was really one in respect of an act which the officer had completed already. Though with respect I do not wish to be understood to agree with the reasoning of the learned Judges in all the Bombay and Calcutta cases which I have mentioned, it will be seen that they support the view that "act" in s. 80, C. P. C., does not include a future act, and that the decision in *Superintending Engineer, Bezwada* v. *Chitturi Ramakrishnayya* (8) is not against that view.

I agree that this appeal should be allowed and that the suit should be remanded with costs to abide as proposed by my learned brother.

V. N. V. *Appeal allowed.*

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 384 OF 1926.

October 29, 1926.

Present:—Mr. Justice Jai Lal.

BABU RAM—PLAINTIFF—PETITIONER

versus

NATHU RAM—DEFENDANT—RESPONDENT.

Oaths Act (X of 1873), ss. 8 to 12—Agreement of parties to be bound by oath—One party resiling from agreement—Procedure.

Where a party agrees to be bound by the oath of a particular person but later on resiles from it, it is not competent to the Court to decide the case forthwith against the party so resiling but it should either proceed to administer the oath and to decide the case in accordance therewith or to draw such inference from the refusal as is permissive and then proceed with the trial of the case in accordance with law.

Petition for revision of a decree of the Judge, Small Cause Court, Dasuha, District Hoshiarpur, dated the 24th March, 1926.

Mr. *Shamair Chand*, for the Petitioner.

Mr. *Anant Ram Khosla*, for Mr. *N. C. Pandit*, for the Respondent.

JUDGMENT.—The petitioner instituted a suit for the recovery of Rs. 49-15-3 against the defendant, who denied the claim. The plaintiff thereupon agreed to abide by the oath of one Babu Ram. Apparently this was agreed to by the defendant and the Court appointed a local Commissioner to administer the oath to Babu Ram. The Commissioner, however, made a report to the Court that before him the plaintiff had declined to abide by the oath and consequently that he did not administer the oath. Thereupon the Court dismissed the plaintiff's suit.

It is contended on behalf of the petitioner that the Court below was not justified in dismissing the suit. Either it should have proceeded to administer the oath and to decide the case in accordance therewith, or should have accepted the plaintiff's alleged refusal to abide by the oath drawing such inference from the refusal as is permissive and then proceeded with the trial of the case in accordance with law.

The Counsel for the respondent is unable to show any good reasons against the validity of these assertions. In fact he practically concedes that there is force in them.

I may note that the plaintiff denies that he refused to abide by the oath and states that he is still prepared to abide by it.

I accept this petition, set aside the decree of the Judge of the Small Cause Court and remand the case to him with direction to proceed with the suit in accordance with law with due regard to the above observations. The costs will abide the result.

R. L. *Petition accepted.*

BOMBAY HIGH COURT.

CIVIL REFERENCE No. 4 OF 1926.

July 2, 1926.

Present :—Mr. Justice Fawcett and Mr. Justice Madgavkar.

NARAYAN KALU CHAMBHAR

versus

BAYAJI APPA SANAWANE.

C. P. C. (Act V of 1908), s. 68, Sch. III, r. 9—Execution of decree by Collector—Collector's power to levy expenses of sale as under Land Revenue Code—Government Resolutions of Bombay, effect of—Poundage, whether can also be levied—Bombay High Court Circulars—Rules as to process-fees.

In respect of sales of immoveable property held by Revenue Authorities in execution of a decree of a Civil Court transferred to them for execution according to the provisions of s 68, C. P. C., the Revenue Authorities have power by virtue of the Government Resolutions of Bombay to recover as expenses of sale under Sch. III, r. 9, C. P. C., fees on the scale which applies in the case of sales under the Land Revenue Code. The Court sending the decree for execution to them is not, therefore, competent to direct them to refund the fees so levied. [p. 289, col. 2; p. 290, col. 1.]

There is no legal objection to the levy of poundage fee also in such cases, inasmuch as the levy of poundage is imposed in the case of every sale of moveable or immoveable property and is not restricted to sales held by a Civil Court alone. [p. 290, col. 2.]

Sayed Mahomed Raja Sayed Sadak Mia v. *Thakordas Chaturbhujdas* (1), followed.

Civil Reference made by the Subordinate Judge, Baramati.

FACTS.—A Collector to whom a decree was sent for execution under s. 68, C. P. C., recovered charges for conducting the sale at the rate of 6 pies in the rupee on the proceeds in accordance with the Bombay Government Resolutions No. 7828, Revenue Department, dated 25th June, 1923, and No. 4603, Home Department, dated 3rd April, 1924. The Court levied also the poundage-fee in accordance with the High Court Circulars. The Subordinate Judge, having entertained a doubt as to the legality of this double levy, referred the matter for the opinion of the High Court under O. XLVI, C. P. C.

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

Mr. *V. D. Limaye*, for the Defendants.

JUDGMENT.

Fawcett, J.—The Subordinate Judge of Baramati has referred to us two questions under O. XLVI, C. P. C. The first in brief is, whether the Revenue Authorities have legal power to recover, as expenses of sale, under r. 9 of Sch. III, C. P. C., fees on the scale which applies in the case of sales under the Land Revenue Code. The second question is whether this Court is competent to direct the Revenue Authorities to refund such charges. The Subordinate Judge refers to Government Resolutions (1) No. 7828, dated June 25, 1923, and (2) No. 4603, dated April 3, 1924. The first of these, in effect, is based on the view that the cost of paper, printing, postage and clerical and other labour in connection with the sales of land by the Revenue Authorities has gone up for the past years and that the fees hitherto enforced should be raised, and Government by the resolution doubled the fees previously enforced. The result is the levy of charges at the rate of 6 pies in a rupee, calculated on the amount of the sale-proceeds realised by the sale of immoveable property. The second Resolution of 1924 arose out of complaints from *mamlatdars* that the expenditure they incurred on sales in execution of Civil Court decrees was in excess of the sums put at their disposal, and the Collector of Belgaum said that, in his opinion, it would not be inequitable, if the expenses of sale were recovered at some uniform scale to cover the cost to Government of the travelling allowances payable to the officers deputed to carry out the execution proceedings. He proposed that the same rate should be made applicable to sales of property sold in the execution of the Civil Court decrees as that enforced in regard to land revenue sales. The Commissioner, Southern Division, supported this proposal, and Government held that such fees could be levied as charges incurred by the Collectors under sub-r. (2) of r. 9 of Sch. III. The Collectors were instructed to act accordingly in future.

Mr. Limaye, who has appeared in support of the reference has contended that the fees levied by the Revenue Department were legal, but that the additional levy of poundage under the scale of process-fees, etc., prescribed in the table at pages 204 and 205 of the High Court Manual of Circulars should be held to be illegal. The Government Pleader, on the other hand, contends that both sets of fees are legal. Our attention has been drawn to a case, in which a somewhat similar question arose, *Sayed Mahomed Raja Sayed Sadak Mia* v. *Thakordas Chaturbhujdas*(1). That was a case in which a sale was held through the Collector, who deducted a sum of Rs. 546-14 for expenses of sale at the rate of 6 pies per rupee, as directed in the Government Resolution No. 4603, Home Department, dated April 3, 1924. When the balance of the sale-proceeds reached the Civil Court, the Court deducted from it Rs. 180 as poundage. The appellant in that case objected to that double deduction. But the execution Court overruled the objection. On appeal, it was held by the learned Chief Justice and Coyajee, J., that levy of poundage was entirely independent of the deduction of expenses of sale by the Collector, and that the appellant could not claim that the poundage should be deducted from such expenses of sale. In my opinion, as regards the fee of 6 pies in a rupee levied by the Collector, I can see no adequate reason for holding that such a charge is not permissible under r. 9 of Sch. III, C. P. C., as part of the charges incurred by the Collector in the exercise and in the performance of the powers and duties conferred and imposed on him. The fact that a specific estimate of such charges is not made in each case that arises, but there is a prescribed general rate covering such expenses does not, I think, invalidate the levy of such fees. It is in accordance with the principle adopted by the Civil Courts, as well as by the Revenue Department in regard to land revenue sales, and obviously it saves labour to have a uniform rate that will on the average cover all such expenses rather than to have a detailed account in each and every case. I think also that, if there was a clear illegality in regard to such fees, that would have attracted the notice of the Court in *Sayed Mahomed's case* (1).

(1) 96 Ind. Cas. 363; 28 Bom. L. R. 590; A. I. R. 1926 Bom. 335.

Then, as regards the levy of poundage this is under the table imposed in the case of every sale of moveable or immoveable property. There is no restriction that the sale must be held by the Civil Court which levies the charge, and the authority given by s. 20 of the Court Fees Act of 1870 covers the making of rules charging fees for executing processes issued by the Civil Courts. In a case of this kind the actual process for the sale is issued by the Civil Court, but it is executed not by the Court but by the Collector. Therefore, I think that no legal objection can be taken to the levy of poundage also in such a case. Whether it is desirable that there should be this double levy, seems to me to be a matter to be dealt with administratively and not to be a question that can be judicially determined. In fact, this Court has already taken steps to move Government in the matter. Therefore, I would answer the first question put by the Subordinate Judge in the affirmative, and the second in the negative.

Madgavkar, J.—I agree. In regard to the levy of poundage under the High Court Circulars we are bound by the authority of *Sayed Mahomed Raja Sayed Sadak Mia* v. *Thakordas Chaturbhujdas* (1) where it was held as lawful, although the same argument was used there, as in the present case, *viz.*, that a double levy was unlawful. In regard to the Collector's charge, the charge itself is authorised by law under s. 9 of the Third Schedule of the C. P. C. The only doubtful point is whether the actual charges in each case can be standardised in the manner proposed by the Government Resolution.

How far this double levy works hardly on litigants and the amount and manner of its levy are administrative matters in which we are not now called upon to give an opinion.

Per Curiam.—A copy of our judgment should be transmitted under the signature of the Registrar in accordance with O. XLVI, r. 3, to the Subordinate Judge, Baramati.

In accordance with r. 4 of the same Order, costs of the Reference should be costs in the cause.

A. N. A. *Reference answered accordingly.*

LAHORE HIGH COURT.

MISCELLANEOUS FIRST APPEAL No. 1404 OF 1926.

October 27, 1926.

Present:—Mr. Justice Addison.

BADRI DAS—DECREE-HOLDER—APPELLANT

versus

MR. B. BEVEN PETMAN—JUDGMENT-DEBTOR—RESPONDENT.

Execution of decree—Execution against person or property—Decree-holder's right to choose manner of execution—Interference by Court.

A decree-holder has a right to execute his decree against the person or property of the judgment-debtor as he desires and it would be only in exceptional cases that the executing Court would interfere with this right.

Hargobind Kishan Chand v. *Hakim Singh & Co.* (1), relied on.

First appeal from an order of the Senior Subordinate Judge, Simla, dated the 20th March, 1926.

Mr. *Man Singh*, for the Appellant.

JUDGMENT.—The decree-holder obtained at Ambala a decree for some Rs. 8,000 against a Barrister practising in Simla. The decree was transferred to the Simla Court for execution. The first application for execution was put in on the 9th April, 1925. It was dismissed on the 14th August, 1925, on the ground that the decree had been attached. The second application for execution was presented on the 3rd September, 1925. It was for attachment of the judgment-debtor's property of all kinds. Time was granted to the judgment-debtor on the 6th November, 1925, and further time for a settlement was granted to him on the 4th December, 1925. The decree-holder later stated before the executing Court that all he wished to attach was the office furniture and library, including the law books, of the judgment-debtor. This he valued at more than the decretal amount. The judgment-debtor put in a list of his immoveable property, which admittedly is heavily encumbered, and a considerable part of which is situated in a Native State. He was then ordered to show the amount of encumbrances on his immoveable property but he did not do so. Finally on the 20th March, 1926, the executing Court refused to attach the office furniture and library of the judgment-debtor, under its inherent powers conferred by s. 151 of the C. P. C., and dismissed the application for execution. Against this decision the decree holder has appealed to this Court.

The judgment-debtor has not appeared before me. It is obvious that the order of the executing Court cannot be upheld. It was held by the learned Chief Justice in *Hargobind-Kishan Chand* v. *Hakim Singh & Co.* (1) that "the law confers upon the decree-holder the right to decide whether he should execute his decree for the payment of money by the arrest of the judgment-debtor or by the attachment and sale of his property, or by both, and that while the Court has discretion (which should be exercised in a judicial manner) to refuse execution against the person and property simultaneously, it has no authority, to decline to make an order of committal to prison on the ground that the decree-holder must in the first instance proceed against the property of the judgment-debtor." In the same judgment LeRossignol, J., held that "the decree-holder should be encouraged to proceed against both the property and the person simultaneously and the refusal of the executing Court to grant both reliefs at one time should be the exception and not the rule." It follows from the principles, enunciated in the above ruling that the decree-holder has the right to execute his decree in the manner he desires and that it would be only in exceptional cases that the executing Court would interfere with that right. In the present case there was no reason why the decree-holder should not have been allowed to attach the furniture and library of the judgment-debtor. The latter was asked to show the extent to which his immoveable property was encumbered and he has not done so. Admittedly it is heavily encumbered, while some of it is in a Native State and cannot be proceeded against in the executing Court. As other property of the judgment-debtor was available, the Court had no right to compel the decree-holder to embark upon lengthy execution proceedings in bringing the encumbered immoveable property to sale. The judgment-debtor has been shown every concession and considerable time has been given him in which to settle the decree. During this time it was also possible for him to arrange to sell his immoveable property. In the circumstances I accept the appeal *ex parte* and order the executing Court to attach the furniture and library in question and to proceed with the execution of the decree in accordance with law. The appellant will have his costs here.

R. L. & A. N. A. *Appeal accepted.*

(1) 93 Ind. Cas. 54; 6 L. 548; A. I. R. 1926 Lah. 110.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 263 OF 1924.

November 1, 1926.

Present:—Mr. Justice Banerji.

Srimati JOTI BALA DEBI—DEFENDANT—APPELLANT

versus

M. SHEO LING SHAMI JANGAM AND ANOTHER—PLAINTIFF AND DEFENDANT—RESPONDENTS.

Custom Sale of house by parjautdar—Zemindar, *right of, to get one-fourth of sale consideration*—Mohalla *Man Sarobar, Benares City—Appeal, second—Evidence of custom, whether can be considered.*

In second appeal the High Court is entitled to consider whether the evidence on the record is legally sufficient to establish an alleged custom. [p. 292, col. 2.]

There is no custom in *Mohalla* Man Sarobar in the City of Benares whereby the *zemindar* is entitled at the time of the transfer of a house by *parjautdar* to get one-fourth of the sale consideration from the vendor or the vendee. [p. 292, col. 1.]

Second appeal against a decree of the District Judge, Benares, dated the 4th December, 1923.

Dr. *K. N. Katju*, for the Appellant.

Sir Dr. *T. B. Sapru* and Mr. *P. N. Sapru*, for the Respondents.

JUDGMENT.—This is a defendant's appeal in a suit to recover *haq i-chaharum*. A preliminary objection has been raised by the respondent that as the amount of the claim is below Rs. 500, the suit was a suit of the nature of Small Causes. I have repelled the contention as I am of opinion that the case is not of a nature cognizable by the Court of Small Causes.

The plaintiff came into Court on the allegation that he was the *zemindar* and owner of the site of the house purchased by the defendant, which is in *Mohalla* Man Sarobar in the City of Benares, that the defendant No. 2 sold his right as a *parjautdar* to defendant No 1, and that in *Mohalla* Man Sarobar in the City of Benares there is a custom in vogue that at the time of transferring a house or rights as a *parjautdar*, the *zemindar* gets one-fourth of the sale consideration, and both the vendor and the vendee are liable for the payment of this amount, which is called *zar-i-chaharum*. The defence to the action is, as set up by the defendant who admits that she is the *parjautdar* of the site on which the house stands, that no custom or *zar i-chaharum* is in vogue in *Mouza* Bhadani, *Mahal* Sonarpura or Man Sarobar in the City of Benares. Both the lower Courts have held that the plaintiff, upon the evidence, has proved that there was a custom of *haq-i-chaharum* in *Mohalla* Man Sarobar. In appeal it is contended by the learned Advocate for the appellant that this custom of *haq-i-chaharum* is an unreasonable custom and cuts down the right of ownership, and whether the area is large or small, it diminishes the general value of land in Benares. I am of opinion that it is impossible to lay down any general rule as to whether a custom is such that no Court would recognise it. Dr. Katju for the appellant has laid all the documents before me, and has submitted that if I was sitting as a Court of Appeal, I would never hold that the custom had been proved. It is impossible in second appeal to treat a question of custom as a question of fact. In the case of *Rup Chand* v. *Jambu Parshad* (1) their Lordships of the Privy Council had a question of custom among *Jains* before them, and at page 252* their Lordships say: "The question in the present case was, and is, whether a custom, applicable to the parties concerned, and authorising the adoption of a married boy, has been established. This is, strictly, speaking a pure question of fact determinable upon the evidence given in the case." I must, therefore, treat this question as a question of fact. Dr. Katju then goes on to argue that as was held in the Full Bench case of *Ram Bilas* v. *Lal Bahadur* (2), I am entitled to consider whether the evidence on the record was legally insufficient to establish an alleged custom. This, I think, I am entitled to do, because if the evidence is legally insufficient to establish a custom, it becomes purely a question of law.

The question raised in the written statement, namely, that there is no custom of *haq-i-chaharum* in *Mahal* Bhadani, of which Sonarpura is a part, and of which Man Sarobar is a smaller part, by the defendant has introduced into the case a number of instances of the exercise of the right of receiving *haq-i-chaharum* by the *zemindar*. Really the case ought to be strictly confined to the allegation of the plaintiff, that in *Mohalla* Man Sarobar there is or is not a custom as alleged by the plaintiff. The history of this particular piece of land on which the house has been built is that the

(1) 6 Ind. Cas. 272; 32 A. 247; 14 C. W. N. 545; 7 A. L. J. 349; 12 Bom. L. R. 402; 11 C. L. J. 454; 8 M. L. T. 3; 20 M. L. J. 439; (1910) M. W. N. 432; 37 I. A. 93 (P. C.).

(2) 30 A. 311; A. W. N. (1908) 112; 5 A. L. J. 456; 4 M. L. T 169.

*Page of 32 A.—[*Ed.*]

original grant, which was made, did contain a stipulation that when the *parjautdar* parted with the house and the land, the *zemindar* would be entitled to one-fourth of the sale consideration. These two documents have been specifically referred to in the judgment of the Munsif. They are *kabuliyats* dated 5th July, 1884, and 29th November, 1898. The latter *kabuliyat* uses the expression "*hasb dastur mohalla*." There is nothing on the record to show how many houses there are in the *mohalla* called Man Sarobar, which is admittedly a very small *mohalla* in *Mohalla* Sonarpura in the City of Benares. Documents have been filed by the defendant to show that in 1878 the predecessor-in-title of the plaintiff claimed *haq-i-chaharum*, at the time when a house in this *mohalla* was sold, but the plaintiff failed to prove that a custom did exist in this *mohalla*. It is also urged by Dr. Katju that among the list of documents filed by the plaintiff, he has only filed decrees which show that he did receive one-fourth of the sale consideration, but the decrees do not show whether in each case there was a contest, and whether the claim was based on a contract or custom. This, no doubt, is correct, and the instances cited by the plaintiff are, therefore, of no value. As I confined the plaintiff to refer me to instances relating only to Man Sarobar, Sir Tej Bahadur Sapru has pointed out evidence of the exercise of the right to receive *haq-i-chaharum* in six cases beginning from 1896 to 1918. The last is not to my mind of any value, but in the absence of any evidence as to the number of transfers after 1878 and the fact that ever since, as alleged by the plaintiff, of his acquiring ownership of this *mohalla* he has exercised the right of receiving *haq-i-chaharum*, it is impossible for me to hold that the evidence is legally insufficient to prove the custom which has been held proved by both the Courts below. Whether sitting as a Judge of facts I would have come to the conclusion that the custom alleged has been proved, is a different matter. A number of cases were cited before me where the right of pre-emption has been held to have arisen in 20, 30 or 40 years, but each case must depend on the circumstances of that case.

I am, therefore, of opinion that there is no force in the defendant's appeal. I dismiss it with costs including fees on the higher scale.

Z. K. *Appeal dismissed.*

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 68 OF 1924.

June 28, 1926.

Present:—Mr. Justice Fawcett and Mr. Justice Madgavkar.

SURSINGJI DAJIRAJ THAKORSAHEB —PLAINTIFF—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA—DEFENDANT—RESPONDENT.

Gujarat Talukdars' Act (VI of 1888), s. 22—Wanta land -Assessment -Suit for declaration of non-liability to assessment—Limitation—Limitation Act (IX of 1908), Sch. I, Art. 120—Cause of action, when arises—Order of Government declaring liability to assessment, effect of—Misdescription in village records, effect of—Estoppel of Government.

Certain lands were for a large number of years shown in the village accounts as *wanta* rent-free lands. In 1872-73, on a reference by the Revenue Authorities Government held that these lands were improperly shown as alienated lands not liable to assessment, but the wrong description in the village records was not corrected till the year 1918 when a revision survey was introduced. The *talukdar* sued in 1920 for a declaration that the lands were not liable to be assessed and for an injunction restraining the Government Officers from collecting assessment:

Held, (1) that the action of the authorities in 1872-1873 could not properly, in the absence of evidence to show that notice thereof was given to the then *talukdar*, be treated as giving rise to a cause of action for a suit for declaration, and that the suit was, therefore, not barred by limitation under Art. 120 of the Limitation Act; [p. 295, col. 2.]

(2) that in the face of the orders of the Government that these lands were not proper *wanta* lands and should be treated as liable to *jama*, the misdescription of the lands in the village records could not be treated as an admission by Government and did not operate as an estoppel against the Government; [p. 298, col. 1.]

(3) that the fact that the lands were recited to have been given as '*wanta*' did not necessarily mean anything more than that a 'share' or 'portion' of the estate was given and that the mere fact that they came to be entered subsequently as '*wanta* rent-free' did not have the effect of making them *wanta* lands as if they had been originally such lands; [p. 298, col. 2.]

(4) that the plaintiff was not entitled to the declaration and injunction sued for. [*ibid.*]

First appeal from a decision of the Joint Judge at Ahmedabad, in Suit No. 8 of 1920.

Mr. *R. W. Desai*, for the Appellants.

Mr. *S. S. Patkar*, Government Pleader, for the Respondent.

JUDGMENT.

Fawcett, J.—In this appeal the plaintiff-appellant seeks a reversal of the decree of the Joint Judge, Ahmedabad, dismissing his suit on the ground that it is barred by limitation. The respondent has, however, filed cross-objections in regard to the finding of the Joint Judge in favour of the plaintiff on the merits. Therefore, the

whole case is now before us for decision.

The first question is the point of limitation. The plaintiff is the Thakor of Utelia and owns certain villages as *talukdar*, including the village of Hariala in the Matar *taluka* of the Kaira District. In that village there is a group of lands, which has for a long time been known as "Bhavsingji's Wanta." The main facts about it are not disputed. These lands have, for a very large number of years, been shown in the village accounts as *wanta* rent-free land. On the other hand, in 1872-73, on a reference about them by the Revenue Authorities, Government held that these lands were improperly shown as alienated lands, not liable to assessment for the purpose of fixing the total *jama* leviable for the village. The wrong description of these lands in the village accounts was not corrected until about 1918 when a revision survey was being introduced, and the plaintiff brought his suit against the Secretary of State in 1920 on the ground that Government were not justified in treating these lands as liable to *jama* or assessment, and classing them as Darbari along with other *talukdari* lands. He sought a declaration that these lands were not so liable, and he also asked for a permanent injunction restraining the defendant by himself, or any of his subordinate officers, from recovering such *jama* or assessment.

The Joint Judge has held that, in view of the Government Order of 1872-73, the plaintiff had notice that no exemption from *jama* was allowed in respect of these particular *wanta* lands, also that Meghabhai Ratansing, as representing the *talukdar* of Utelia, submitted a petition to the Talukdari Settlement Officer, on June 13, 1892, asking that *wanta* land should be exempted from *jama*, and that this also showed that the *talukdar* had notice about the treatment of these lands by Government. Further correspondence carried on by the plaintiff since 1918 would not, in the Joint Judge's opinion, give him a fresh cause of action. Consequently, he held that the claim was barred by limitation.

The first objection taken by Mr. Ramdut Desai for the appellant before us is that Government are estopped from raising this plea of limitation by the terms of a compromise in a previous suit between the parties (No. 12 of 1896) in the Court of the District Judge of Ahmedabad. That was a somewhat similar suit in regard to *wanta* lands in other villages of the plaintiff in the Dholka *taluka* of the Ahmedabad District. The compromise (Ex. 60) provided in effect that such lands were to be excluded from liability to payment of *jama*, except any that were in the possession of the plaintiff, or that subsequently came into his possession. In para. 5 of the terms of compromise it is said :—

"As regards those villages of the plaintiff which are in the District of Kaira, a revised settlement in respect of the same will be made according to the circumstances connected with the villages. And the '*tharav*' (decision), under which the '*wanta*' lands in the possession of the plaintiff and situate in the villages under Dholka are held to be liable for *jamabandi*, will not be considered as a basis in the matter of the villages in Kaira."

It is contended that this means that the dispute in regard to the Kaira villages was one which could be litigated between the parties, irrespective of anything that had happened in the past. In my opinion, such a wide interpretation cannot be given to this clause. It seems to me merely to provide that the decision in the case of the Dholka lands should be without prejudice to the settlement of the *jama* with regard to *wanta* lands in Kaira villages. The sentence about the decision regarding Dholka villages not being considered as a basis, etc., would *prima facie* mean that the mere agreement that certain Dholka *wanta* lands in the possession of the plaintiff should be liable to payment of *jama* should not be made the basis of a similar decision that *wanta* lands in the possession of the plaintiff in Kaira villages should be liable to *jama*. The question of such liability was to be decided on its own merits, apart from the decision in this particular compromise; and, in my opinion, there is nothing in those terms which can be held to debar the Secretary of State in Council from raising the point of limitation, which has been taken in this suit.

A minor point in connection with this contention is, that the Secretary of State for India in Council in this Court was summoned to produce through the Government Pleader a Government Resolution, which is the one sanctioning the compromise. The Government Pleader has objected that that Resolution recites various opinions of Government Officers, including

their legal adviser namely, the Remembrancer of Legal Affairs, and claims privilege under s. 124 of the Indian Evidence Act. Certainly, that is a claim which can properly be made in regard to such a Resolution; and, in any case, it does not seem to me that this document would help us in deciding what is the meaning of para. 5 in the terms of the compromise.

Coming to the question of limitation on its own merits, there is certainly a good deal that helps the appellant. The fixing of the *jama*, in a *talukdari* village like Hariala, was made not on any precise method of assessing particular lands, and then adding up the total, but from a variety of considerations a total lump sum was fixed as that which the *talukdar* should pay in respect of his village. In arriving at the decision as to what that lump sum should be, it was customary to take into consideration what lands had been alienated, and so could be treated as not liable to assessment. But, that was not the sole factor, or even very important factor, in determining the actual amount that was to be levied. This will be quite clear from a perusal of the correspondence which has been produced regarding the fixing of the total *jama* in the case of this village; and the settlement of that total lump sum was made simply in the course of correspondence between Government and its officers. The Talukdari Settlement Officer, and the Collector and other officials, such as the Commissioner, made reports, and Government then decided what should be the total lump sum due. It is not shown that this fixing of the total amount was made in consultation with the then *talukdar*, and it is also not shown that the *talukdar* was given notice that in fixing the *jama* these lands, known as "Bhavsingji's Wanta" had been treated as liable to *jama*. It is not in fact even shown that the village papers would give the *talukdar*, or his representatives, clear notice to that effect. The Government Pleader has admitted that he cannot put his finger on any particular document which would afford express notice of that particular fact. Of course, it may be that the *talukdar* might surreptitiously know that Mr. Richey had reported that these *wanta* lands should not be treated as alienated, and, therefore, free from assessment. But a Court cannot go merely on a surmise of that kind. I think the principle applicable is the one that was followed by this Court in *Mahipat* v. *Lakshman* (1). That was a case where a Settlement Officer in Ratnagiri had made a certain decision, and it was contended that the suit was barred as not being brought within six years from the date of his decision. But, on the other hand, it was not shown that that decision had been communicated to the plaintiff, and Parsons, J., in his judgment points out (page 430*) that—

"No provision is made (in the Act) for the communication of his decision to any of the parties affected thereby. It may lie burried in his desk for three years as in the present case, and no one may know of its existence till it is made use of for the purpose of framing the register. It is not necessary to discuss what effect the proved communication of the decision might have; it is sufficient to say that the decision can have no force until it is pronounced or in some way brought to the notice of the parties, and that as this is not shown to have been done in the present case till the *botkhat* was framed and signed, the date when this was done should be taken as the starting point of limitation."

In the present case, I think, it would not be fair to treat the action of the authorities in 1872-73 as giving notice to the then *talukdar* that these lands were treated as liable to pay *jama*, when, in fact, in the village accounts they were not so shown, so as to constitute a cause of action for bringing a suit like the present. There is no dispute that the Article of the Indian Limitation Act applicable is Art. 120. Therefore, the Court has to see when the cause of action accrued, and, in my opinion, these proceedings of 1872-73 cannot properly, in the absence of proof that notice was given to the *talukdar* to the effect I have mentioned, be treated as giving rise to a cause of action.

The Joint Judge has, however, further relied upon the representation by the Karbhari Meghabhai that I have already mentioned. This is Ex. 101. No doubt, it is a document which protested against *wanta* lands being treated as liable to *jama*. But the Talukdari Settlement Officer, Mr. Quin, remarks in his letter to

(1) 24 B. 426; 2 Bom. L. R. 228; 12 Ind. Dec. (N. S.) 817.

*Page of 24 B.—[*Ed.*]

the Collector upon this representation, Ex. 130:—

"He (*i. e.*, the Karbhari) does not specify the lands to which he refers but takes objections to the general principles which have been followed by Government in dealing with the question."

It does not refer to the *wanta* lands in suit, but is a general representation as mentioned by Mr. Quin. In these circumstances, I cannot follow the Joint Judge's remark that this petition had the effect of giving one more notice that no exemption on these *wanta* lands was allowed. It could only be effective, if it indicated that the *talukdar* and his representative, the Karbhari, knew that these particular *wanta* lands were being treated as liable to assessment. I do not think that the document can be carried so far. Therefore, in my opinion, there is a reasonable doubt as to the suit being barred by limitation, and I would hold that it is not so barred.

The next question, in view of the cross-objections, is whether the Joint Judge erred in holding that on the merits the plaintiff has a right to the declaration sought. He has held that he has no right to an injunction in view of s. 45, cl. (2), of the Bombay Land Revenue Code. But that is a minor point. The main question is whether he is entitled to the declaration. The Government Pleader urges that these particular lands are shown by certain evidence not to be really *wanta* lands at all. He has referred us, first of all, to the report made in 1918 by Mr. Mohanlal, who took part in conducting the revision survey, and who has been examined as a witness in this case. In paras. 2 and 3 of this report, Ex. 93, he says:—

"A perusal of the Waghela History (page 166) published by Mr. Krishnaram Ganpatram in 1914 A. D. shows that Bhavsingji was a younger son of Jetsingji and his elder brother Aliaji had succeeded to the *gadi*. Bhavsingji died in 1840 (A. D. 1784) and left no son behind him.

"I am unable to trace the origin of this *wanta* as well as the circumstances under which it was obtained by him. However, I gather from the petition (it has come to me from Mansingji in connection with other matter) of Mansingji Nathuji, which is dated November 29, 1917, that the lands in dispute originally belonged to his own *wanta*, that they were given to the *talukdar* of Kaira Wanta in dowry, and that by the latter they were also given in dowry to the Thakore Saheb of Sanad. The year or years in which the above happened cannot be ascertained."

No evidence has been given in this suit in regard to the suggestions there put forward as to the lands having been given in dowry.

The second document that the Government Pleader strongly relies upon is Ex. 57. This is an abstract of the Talati's account of lands in this village of Hariala for the *Samvat* year 1810 (*i. e.*, 1823-24 A. D.) which under various headings shows different classes of lands, the amount of the income therefrom for two successive years, and the decrease or increase. Various *wanta* lands are mentioned in this document. At the foot of the abstract there is a note which appears to have been part of the form in which it was prepared. Clause 9 contains the following provisions:—

"All the villages have '*wanta*' (lands). A statement should be prepared in writing showing what claim the people entitled to *wanta* (lands) have over the lands, and what claim the cultivators who cultivate their '*wanta*' (lands) put forth over the *wanta* lands.....In connection with the Sheja villages there was the enjoyment of the Vighotee and there are '*udhed*', etc. What right the cultivators of those villages have over the lands. In that manner registers showing the arrangements with respect to the claims of the agricultural population of every village should be kept according to (their) holdings."

Then, under this we have entries, the first column being Number, the second column being for the name of the village, and the third column being headed "Claim." The third column of the entry in regard to this village of Hariala says:—

"This village is 'Sheja.' Particulars in connection with right thereof are as follows:—There is a *wanta* in our village. Facts relating thereto are that when the brother of Waghela Jijibhai Aliaji became 'Phatawa' (*i. e.*, a petty chief separated from his brother with his share of the inheritance) the 'Gharda' (? father) of Jijibhai separated and gave a '*wanta*' of about 1,100 *bighas*. (? The same) was given to Thakor Bhavsingji. That party died, so at present the said 'Wanta' is being enjoyed by Jijibhai Aliaji 'Nakro' (alone or rent-free)."

Upon this it is contended that the origin of the *wanta* really was as there stated, that Jijibhai Aliaji, a former *talukdar*, who has already been referred to in the extract from Mr. Mohanlal's report, gave this parcel of land to his brother Bhavsingji as his share of the inheritance. Bhavsingji had died and so the land was resumed by Jijibhai Aliaji. The document is certainly one which is entitled to considerable claims of reliability. In the first place, it is produced by the plaintiff himself from the village records, and it has every appearance of genuineness. It is an old document, namely of about 1823, and the statements in this document are relevant evidence under s. 35 of the Indian Evidence Act. The document was made at a time when the history of this "Bhavsingji's Wanta" might well be in the memory of man, especially in the memory of the officers preparing this statement, for (accepting the dates that are given in Mr. Mohanlal's report, which are taken from a published history not likely to be inaccurate) Bhavsingji died in A. D. 1784, that is to say, about forty years before the preparation of this document. It is supported by the fact that it fits in with the historical details that are mentioned in Mr. Mohanlal's report, namely, that there was a *talukdar* of the name of Jijibhai Aliaji, that he had a brother Bhavsingji as already mentioned, and that he died without issue; and there has been no dispute raised before us as to the correctness of those particular facts.

Again, from Mr. Mohanlal's report it appears that in the earliest document that was relied upon by the Karbhari, namely, the Kharda of 1877 (A. D. 1821), the lands in dispute were shown in the name of Waghela Bhavsingji. From para. 8 of the same report, it appears that that Kharda had been prepared on the basis of the previous Kharda of *Samvat* 1876. The fact that these lands were then entered in the name of Waghela Bhavsingji certainly points to their being connected with one of the *talukdar's* family, because "Waghela" is a term which is constantly applied to *talukdars* like the plaintiff (see, for instance, para. 14 of Mr. Peile's report at page 97 in "Selections from the Records of the Bombay Government, No. CVI, New Series," where he says: "In later days, when the Moghul Empire fell to pieces, the Tulput part of the villages was seized by the holders of the adjoining *wanta* or by new clans. In Dholka the Waghelas took back their own estates.") Mr. Richey, the then Talukdari Settlement Officer, in his report, which led to the Government orders about treating these lands as liable to *jama*, also says (see para. 9 of Mr. Ashburner's report, Ex. 99):—"This *wanta* is so entered in the village accounts in the name of Bhavsingji, an early Thakur of Utelia." And, in fact, there is no dispute that this Bhavsingji was a brother of the then *talukdar*.

Another thing that may be mentioned is that the description of these lands as "Wanta", after they were resumed by the Thakor, would not be any deviation from what is the original meaning of the word, namely, "share or portion," as mentioned in *Dolsang Bhavsang* v. *Collector of Kaira* (2). It would be the share of the estate that had been given to the younger brother, and that might explain how this land came to be treated as *wanta* rent-free land.

On the other hand, the Joint Judge, though in para. 15 of his judgment he remarks that "*wanta*" is no doubt a misnomer in this case, has held that, in view of the manner in which these lands were shown in the village accounts, including a period when the villages had been under Government management, the classification of these lands as "*wanta* rent-free" lands was binding upon Government. Apparently his attention was not particularly drawn to Ex. 57; at any rate he has made no reference to it in his judgment. No doubt, such entries can be of considerable force, and strong reliance was naturally placed by Mr. Desai upon the decision in *Shaik Gulam Mohidin* v. *Collector of Ahmedabad* (3). But that was a very much stronger case than the present. In that case there had been no decision of Government that the lands were to be treated as liable to *jama*, such as we have in the present case. On the contrary, in Mr. Peile's report, which has already been referred to, and which has been frequently cited before us, he himself quoted this particular case as an instance of *wanta* land being sold by a *talukdar* to a stranger, who had built upon it. Then the Government had themselves continuously shown 500 *bighas* of the lands in that suit as *wanta* lands, and there were also what are referred to as "the proved acts of Mr. Fawcett, Mr. Blane and Mr. Rogers,"

(2) 4 B. 367 at pp. 368, 369; 3 Ind. Dec. (N. S.) 752.
(3) 12 B. H. C. R. App. 278.

which were incompatible with the contention that the land was assessable like other land.

No doubt, on the other hand, there was the misdescription of the lands in the village records, but that mistake cannot fairly be treated as an admission by Government in the face of the orders of Government that these lands were not proper *wanta* lands and should be treated as liable to *jama*. This is a suit against the Secretary of State and not against the Collector, and the admission in the accounts, far from being authorised or ratified by Government, was against their direct orders.

Mr. Desai relied on the fact that this Court in the case last cited said:—

"We find ourselves unable to act upon the general theory adopted by Mr Richey that *wanta* land is assessable like other land."

That is a remark which is natural in view of the evidence in that case that the lands had been treated by responsible Government Officers as *wanta* lands not liable to assessment like other land, and on the principle that "an ounce of fact is worth more than a pound of theory," the High Court preferred to act upon that evidence rather than upon the theory of Mr. Richey that is mentioned. But, in this case also, there is no need to resort to any such theory. We have what I consider strong and reliable evidence as to the real origin of these *wanta* lands. And, in my opinion the mere fact that there was this mistake in the village accounts of showing the lands as *wanta* lands free from tax, does not operate as an estoppel or suffice to outweigh the evidence that I have mentioned.

One of the officers in charge of this village, while it was under attachment by Government, has given evidence in this case, namely, the witness Chunilal Bhogilal, Ex. 117, and he deposes that "The *khata* of Waghela Bhavsingji was entered in conformity with the practice." That is an obvious explanation as to how this treatment of the lands as "Wanta rent-free" came to continue so long. And whatever effect might otherwise be given to that treatment, if the Government had not passed the orders they did in 1873, it seems to me clear that, in the face of those orders, a Court cannot properly say that these entries are binding upon Government, as the Joint Judge has held.

We have also been referred by Mr. Desai to the decision in *Talukdari Settlement Officer* v. *Chhagan Lal Dwarkadas* (4). But that case is, in my opinion, clearly distinguishable from the present, as was pointed out by the Assistant Judge in the suit which led to S. A No. 712 of 1922 in this Court (*Sursangji Dajiraj* v. *The Settlement Officer, Gujrat*), decided by Macleod, C. J. and Crump, J., on November 11, 1924 (unreported). In that appeal the present appellant was a party, and I refer to the remarks of the Assistant Judge in para. 29 of his judgment at page 24 of the printed book in that case. This High Court has decided that ordinarily lands given as *jivai* or maintenance to a cadet in the family are part of the *talukdari* estate and liable to payment of *jama*: *cf. Bhaiji Ishvardas Shah* v. *Talukdari Settlement Officer* (5). The case of *Sursangji Dajiraj* v. *The Settlement Officer, Gujrat*, S. A. No. 712 of 1922, decided by Macleod, C. J. and Crump, J., on November 11, 1924, (unreported) covered the case of *wanta* lands, and these were held to be on the same footing as *talukdari* estate liable to *jama*. I do not for one moment mean to say that, supposing it is proved that a *talukdar* originally had certain *wanta* lands, and that he gave a portion of those *wanta* lands to a younger brother and subsequently resumed them, that would affect their original character as *wanta* lands and make them liable to *jama*. But the present is not a case of that kind. We have this particular group of lands known as "Bhavsingji's *wanta*." In the absence of evidence to the contrary, the presumption, in my opinion, is that the *talukdar* of that time took part of the *darbari talukdari* estate and assigned it to Bhavsingji. Exhibit 57, no doubt, states that he gave a "*wanta*" of about 1,100 *bighas*, but that does not necessarily mean anything more than that he gave a 'share' or 'portion' of the estate lands, and the mere fact that they came to be entered subsequently as "Wanta rent-free" does not have the effect of making them *wanta* lands as if they had originally been such lands. They are not, therefore, lands wholly or partially exempt from payment of land revenue within the meaning of s. 22 of the Gujarat Talukdars' Act VI of 1888.

Accordingly, I think the respondent is entitled to succeed on the cross-objections,

(4) 8 Ind. Cas. 624; 12 Bom. L. R. 903; 35 B. 97.
(5) 58 Ind. Cas. 88; 44 B. 832: 22 Bom. L. R. 906.

and that on its merits the plaintiff's suit must be held to have failed. The cross-objections are allowed with costs, and the appeal is dismissed with costs. As he has failed on the merits, the plaintiff must also bear defendant's costs in the Court below.

There is one further point that I should refer to. In this appeal the appellant has asked us to admit additional evidence as to applications made by the *talukdar* in the years 1873-75 to be informed about certain matters. This request is one to admit evidence that might help the appellant upon the point of limitation. No sufficient grounds, however, have been shown why that evidence could not have been adduced in the lower Court, for, although it is said that these papers had got mixed up with papers of other *talukdari* villages, yet there had been litigation between the *talukdar* and Government, namely, the suit of 1896, and these papers had actually been produced in that suit, so that there was no sufficient cause for the plaintiff not being aware of them. Also, in any case, it does not appear to me that these papers would materially assist us. Accordingly, I would, in any case, refuse this application. But, as we have, on other grounds, decided the point of limitation in favour of the plaintiff, this really does not matter.

Madgavkar, J.—I agree.

A. N. A. *Appeal dismissed.*
Cross-objections allowed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 193 OF 1924.
November 1, 1926.
Present:—Mr. Justice Iqbal Ahmad.
ITAR SINGH AND OTHERS—PLAINTIFFS—APPELLANTS
versus
UMRAO AND ANOTHER—DEFENDANTS—RESPONDENTS.

C. P. C. (Act V of 1908), s. 11—Res judicata—*Several suits between same parties pending in same Court—Decision of issue in one suit, whether operates as* res judicata *in other suits—Jurisdiction of Civil and Revenue Courts—Decision of Revenue Court, whether binding on Civil Courts.*

The rule of *res judicata* so far as it relates to the trial of an issue refers not to the date of the commencement of the litigation but to the date when the Judge is called upon to decide the issue. Where, therefore, several suits between the same parties are pending in the same Court which is competent to try all the suits, the decision of a particular issue in any one of such suits, operates as *res judicata* in all the other suits that fall to be subsequently decided and in which the same issue arises for determination. [p. 299, col. 2; p. 300, col. 2.]

The competence of a Court for the purpose of s. 11 of the C. P. C. must be determined irrespective of any provision as to a right of appeal from the decision of such Court. [p. 299, col. 2.]

The decision of a Revenue Court in a matter within the exclusive cognizance of that Court is binding on the Civil Courts. [p. 300, col. 2.]

Second appeal against a decree of the District Judge, Meerut, dated the 1st November, 1923.

Dr. *N. C. Vaish* and Dr. *S. N. Sen*, for the Appellants.

Dr. *K. N. Katju*, for the Respondents.

JUDGMENT. — This appeal must succeed. It is a settled proposition of law that the rule of *res judicata* so far as relates to the trial of an issue refers "not to the date of the commencement of the litigation but to the date when the Judge is called upon to decide the issue." It is equally settled that the competence of a Court for the purpose of s. 11 of the C. P. C. is "to be determined irrespective of any provision as to a right of appeal from the decision of such Court." *Vide* Explanations I and II of s. 11 of the C. P. C., and the case of *Beni Madho* v. *Indar Sahai* (1). It remains only to apply this proposition of law to the facts of this present appeal.

The suit out of which this present appeal arises was brought by the plaintiffs-appellants for arrears of rent for three years, on the allegation that the plaintiffs were the ex-proprietary tenants of the plots in respect of which the rent was due from the defendants, and that the defendants were in possession of these plots as sub-tenants, on behalf of the plaintiffs. The defence to the suit was that the defendants were not in possession as sub-tenants on behalf of the plaintiffs, but being *zemindars* of the plots in dispute, were in possession as *zemindars*, and the plots in dispute constituted their *khudkasht* land. The learned Assistant Collector who tried the suit decreed the plaintiffs' claim and against the decree an appeal was filed by the defendants in the Court of the District Judge.

In the meantime the defendants, in order

(1) 3 Ind. Cas. 707; 32 A. 67; 6 A. L. J. 991.

to strengthen their position, applied for correction of the entries in the revenue papers. This case was also tried by the very Assistant Collector who had tried the suit for arrears of rent and he, holding that the defendants were rightly entered as sub-tenants in the revenue papers, rejected the application for correction of the papers. On appeal, by the defendants of the present suit, the learned Collector reversed the decision of the Assistant Collector in the correction of *jamabandi* case.

After the decision by the Collector, the appeal filed in the Court of the District Judge against the decree in the suit for arrears of rent case, came up for hearing and the judgment of the learned Collector was produced before the learned District Judge. The learned District Judge observed in the course of his judgment that he was not bound by the judgment of the Collector in the correction of *jamabandi* case, but because of certain reasons that he assigned in the course of his judgment, he reversed the decree of the Assistant Collector and dismissed the plaintiffs' suit. Against that decree of the District Judge the present second appeal was filed in this Court and has to-day been put up for hearing.

In the meantime the decision of the Collector has been reversed by the learned Commissioner and the Commissioner's decision has been upheld by the Board of Revenue. In short, in the correction of *jamabandi* case it has been finally decided by the Revenue Court that the defendants are the sub-tenants of the plaintiffs-appellants. Armed with this decision of the Revenue Court the plaintiffs filed a suit for ejectment under s. 58 of the Tenancy Act against the defendants-respondents. That suit has also been decreed by the learned Commissioner. The decisions of the learned Commissioner referred to above were filed in this Court on behalf of the plaintiffs-appellants and these documents, by an order dated the 4th June, 1926, have been admitted in evidence by a learned Judge of this Court under the provisions of O. XLI, r. 27 of the C. P. C. A reference to the judgment of the Commissioner to the ejectment suit will show that the order of the learned Commissioner in the correction of *jamabandi* case has been upheld by the Board of Revenue.

The suit for arrears of rent, the correction of *jamabandi* case and the suit for ejectment under s. 58 of the Tenancy Act were all triable by an Assistant Collector of the first class. In short, the same Court was competent to try all the three suits that have been litigated between the parties. Therefore the decision of a particular issue in any one of those three suits would operate as *res judicata* in any one of the three suits that falls to be subsequently decided and in which the same issues arise for determination. The common issue that called for a determination in all the three suits referred to above was whether or not the defendants are the sub-tenants of the plaintiffs. The decision of the Revenue Court in the ejectment and in the correction of *jamabandi* cases which have been decided prior to this appeal being that the defendants are in the position of sub-tenants has the effect of *res-judicata* in the present appeal.

I need hardly point out that the decision of the Revenue Court in a matter within the exclusive cegnizance of that Court is binding on the Civil Courts. *Vide Mollo* v. *Ramlal* (2). That question does not arise in the present case, inasmuch as all the three suits referred to above were suits instituted in the Revenue Court. It would be anomalous to hold that the decision of the Revenue Court in two of the three suits cannot have the effect of *res judicata* that was filed in that very Court and decided by that Court.

For the reasons given above I am of opinion that the decree of the trial Court was correct and ought to be restored. The result is that the appeal is allowed; the decree of the Court below is set aside and the decree of the Assistant Collector is restored with costs throughout. Costs in this Court will include fees on the higher scale.

Z. K. *Appeal allowed.*

(2) 58 Ind. Cas. 772; 18 A. L. J. 1030; 43 A. 191.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 1139 OF 1924.

June 18, 1925.

Present:—Mr. Justice Fforde and Mr. Justice Campbell.

KHAIR-UD-DIN—PLAINTIFF—APPELLANT

versus

TARA SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Defamation—Suit for damages—Charge, proof of—

Benefit of doubt—Journalist, position of—Justification—Damages, amount of.

When a newspaper publishes a defamatory statement charging a person with conduct which, if true, would render him liable to criminal prosecution and subsequently attempts to justify such a charge, the facts charged must be proved with the same degree of precision as would be required in a prosecution on foot of such a charge. In other words, in a libel suit imputing conduct to the plaintiff which would render him liable to criminal proceedings, the benefit of any doubt as to the truth of the allegations complained of must be given, not to the defence, but to the plaintiff. [p. 304, col. 2.]

A journalist who publishes a statement about an individual is in the eye of the law in the same position as any other person. [p. 305, col. 2]

In order to succeed on the plea of justification in a libel suit the defendant must prove that the whole of the defamatory matter is substantially true and it is not enough to show that some of the matters set out in a libellous publication are true. [p. 305, col. 2; p. 306, col. 1.]

The amount of damages for defamation must depend upon the particular facts of each case. [p. 306, col. 2.]

Where the libel complained of is savage, gross and vindictive and is persisted in up to the Court of Appeal and the defendant does not attempt to go into the witness-box to support under oath the plea of justification deliberately raised, substantial damages should be awarded. [*ibid.*]

First appeal from a decree of the Subordinate Judge, First Class, Lahore, dated the 5th May, 1924.

Mr. *C. H. Carden Noad*, Government Advocate and Mr. *Anant Ram Khosla*, for the Appellant.

Dr. *Gokal Chand Narang* and Sardar *Man Singh*, for the Respondents.

JUDGMENT.

Fforde, J.—This is an appeal against the judgment and decree of the trial Judge dismissing the plaintiff's suit with costs.

The plaintiff-appellant is the *Darogha*, or Head Jailor, of the Central Jail at Lahore. The respondent Sardar Tara Singh was at the time of the publication complained of, the proprietor and editor, and the respondent Chanchal Singh was the printer, of a vernacular newspaper known as the Pardesi Khalsa.

The suit was brought for damages for a defamatory statement published on the 15th of February, 1922, in the respondents' newspaper. The paragraph complained of is as follows:—

"*Lawlessness in the Central Jail at Lahore.*

"Bhai Megh Singh Ji of Pind Nathoke, District Lahore, was sentenced to seven years' rigorous imprisonment in the case in connection with the possession of Gurdwara Piple Sahib. He is kept in the Central Jail, Lahore, among ordinary prisoners. On the evening of the 9th he uttered shouts of '*Sat Sri Akal*' after performing his *Rah Ras* (evening prayers). All the prisoners had been confined in their cells. Bhai Megh Singh Ji and another Sikh prisoner were taken out of their cells, and were caused to be beaten by *Pathan* warders, that they passed stool and urine in their trousers. The *Darogha* dragged them (by catching of their *keshas*, long hair of the head) and pulled out their hair (*keshas*).

"The above news has been received through a reliable source. The underlings of bureaucracy for the sake of rewards practise so much tyranny on their Indian brethern, that one shudders to hear of it. The Shromani Gurdwara Committee should at the earliest possible date, sent this news in the form of a communique to the newspapers for publication, and should take notice of the matter."

It is obvious that this paragraph is, if not true, of a highly defamatory nature, inasmuch as it accuses the appellant of ordering two defenceless prisoners to be savagely beaten merely because one of them shouted out a religious phrase in the performance of his customary devotions. The charge is manifestly one of the gravest character, imputing to the appellant as it does, conduct which might form the subject of criminal proceedings, and which would certainly, if true, warrant his dismissal from the Government service.

The only defence to the suit is that the words complained of are true in substance and in fact. That was the sole issue which was tried, and upon that issue the trial Judge found in favour of the respondents, holding that the story of the beating of Megh Singh, as published, was substantially true. The onus of proving this issue was quite correctly placed on the respondents.

The only questions which arise, therefore, for determination in this appeal are, firstly, whether the finding of the trial Judge is warranted by the evidence on the record, and secondly, if not warranted, to what damages is the appellant entitled.

The only direct evidence in the case is that of Megh Singh, one of the persons referred to in the paragraph complained of. The material part of Megh Singh's evidence as given in his examination-in-chief is as follows:—

"I was confined in a separate cell as a punishment for performing my daily prayers and was given corn to grind and was flogged and given gunny clothing. I was beaten by the plaintiff and some prisoners. It was evening time after saying prayers I shouted out *Sat Sri Akal*. The plaintiff abused me and gave kicks and blows with fists and pulled out my *kesh*. He took me out of that cell where I was first confined and transferred to another as a punishment. I put my pulled out hair in an envelope and sent them through Sardar Tara Singh to Baba Gurdit Singh. I took food on the 4th day. Tara Singh told me to do so. No talk between the *Darogha* and Lala Lajpat Rai and Baba Gurdit Singh took place in my presence. Tara Singh told me that they had sent my hair to Amritsar and what order was received from there, we should submit to that and in the meantime I should take my food." In cross-examination he amplified this statement somewhat. He admitted that he alone was beaten, and that he was thrashed by nine men till he became senseless. He stated that his neck ring was twisted by *lambardars* so as to strangle him, that the appellant told his men that he was to be beaten to death and that the appellant would take the responsibility. He said that a certain Tara Singh, who was known to be the Secretary of the Gurdwara Parbandhak Committee and who was in the same Jail at the time, came to see him the morning after this outrage upon receipt of a message from him, and he alleged that Abdul Ghani accompanied Tara Singh. He stated that he gave the hair which had been torn from his head to Tara Singh on the occasion of this visit unobserved by Abdul Ghani. This hair, according to him, had been placed in an envelope, and on being pressed as to how he obtained the envelope he first said that the envelope was either made by him or he managed to get it. On further pressure he confined himself to the story that he had manufactured the envelope, explaining that he had already the paper in his possession and that he kneaded some flour to be used as a paste. It is to be specially noted in this witness's evidence that he denied that any other person was beaten with him, in contradiction to the story as appears in the newspaper account —and the reason for this is patent. If he had kept to the newspaper version in this particular, it would have been necessary for him to state who that other prisoner, was, and he would obviously find it very difficult, if not impossible, to make his own story tally with the story of some other prisoner even if another one could be persuaded to come forward and allege that he also was beaten. Moreover, the story as given by this witness does not fit in with the evidence of Tara Singh.

Before dealing with the evidence of the other witnesses it is necessary in order to make their statements intelligible to refer to certain incidents which admittedly took place in the Jail between the 9th February and the end of that month. There is no doubt that at the end of February a hunger strike of political prisoners took place in this Jail. According to the plaintiff this strike started on the evening of the 24th February and continued till noon of the 26th. This strike was due to two causes. One was owing to the belief amongst the prisoners that Megh Singh had been given gunny clothing and a prison cap to wear. The other reason was that the political Sikh prisoners demanded that certain military prisoners, who had just been brought to the Jail, should be confined with them as political prisoners and given black turbans to wear instead of the ordinary Jail clothing and cap.

The date of the strike is also fixed by Abdul Ghani a Deputy Jailor, who likewise says that it commenced on the evening of the 24th and terminated at noon of the 26th February. Autar Singh, a Bar-at-law of Gujranwala who was examined for the defence, fixed the hunger strike as having taken place either towards the end of February or the beginning of March, which is in accordance with the dates given by the two Jailors. In point of fact the time at which this hunger-strike took place does not appear to have been disputed in the Court below; but the significance of these dates becomes apparent when one tests the evidence of Megh Singh with that of the other defence witnesses. The trial Judge states in his judgment that the dates are quite immaterial in the case, but why he makes this statement I find it hard to understand. The witnesses attempt to fix the time of the alleged assault by reference to the time of the strike. One can quite understand their not knowing the actual dates of these events, but they are bound to know whether the strike took place before, immediately after, or at some

lapse of time after the cruelty alleged to have been perpetrated on Megh Singh, more especially as this strike is alleged by the defence to have been organised as a protest against the ill-treatment of Megh Singh. Taken in this sense the times when the various matters took place are of the highest importance. Megh Singh, as is pointed out, says that Tara Singh and Abdul Ghani, the Jailor, came to see him the morning after the assault. Tara Singh fixes this date by saying that the strike had started when his interview with Megh Singh took place. He also says that before the strike the plaintiff had raised no objection to shouts of *Sat Sri Akal*. In cross-examination he fixes the date of the strike definitely by stating that it had been going on for four days when Abdul Ghani took him to see Megh Singh. At the end of his cross-examination he states, "when we came to know definitely about Megh Singh's treatment then we began hunger-strike." These statements obviously cannot be reconciled with the testimony of Megh Singh who declares that Tara Singh's visit took place on the morning after the assault. Moreover, if we are to accept Tara Singh's evidence as to the date of the strike, it is made quite clear that this strike could not have been due to the alleged savage assault upon Megh Singh, as according to him the strike preceded the assault by several days. According to the defamatory article the assault upon Megh Singh took place on the 9th February; the article itself was published on the 15th, and there can be no doubt whatsoever that the strike did not take place until the 24th.

Lala Lajpat Rai, a Vakil of Lahore, who appears to have given his evidence with scrupulous fairness, states that as far as he can remember two causes were assigned for the hunger-strike. One was that certain Akali soldier prisoners, who came into the Central Jail at the time, were kept separate from the political prisoners and were given labour to do. The other cause was that a Sikh prisoner had been mal-treated. So far as the alleged mal-treatment, however, is concerned the evidence of this witness, as indeed is the case with the evidence of every other witness for the defence with the exception of Megh Singh is purely hearsay. He says that "it was reported that a certain Sikh prisoner had been beaten and his beard and his *kesh* had been pulled and that a cap was given to him as his head-dress." He then refers to a certain discussion which took place among the political prisoners which resulted in a request being made to the Jailor that he should take a Sikh prisoner with him to interview the person who was alleged to have been beaten. The Jailor according to this witness "readily accepted the suggestion", and the witness then continues, "To the best of my recollection one of the Sikh gentlemen went there and brought the report that the man was satisfied and he had started eating; upon this the hunger-strike was broken." He concludes his evidence by saying that he did not actually see, but it was said that "some hairs were in the possession of some one in his ward."

The evidence of Gian Singh for the defence is another striking example of the manner in which purely hearsay evidence has been accepted by the trial Judge and used by him for the purpose of coming to his conclusion. The great significance of this witness' evidence is that it shows the real reason why the strike took place. I think I cannot do better than quote *verbatim* the material part of his statement: "There were altogether about 50 political prisoners. There was a Sikh prisoner, perhaps his name was Megh Singh. He had been subjected to harsh treatment from the Jail authorities. His clothes were taken off and he was given gunny clothes and a cap to wear on his head *keshas*. He was also given bar-fetters. I did not see these things myself, but I learnt it from the strikers. The Sikh prisoners who were sent to this Jail were subjected to ill-treatment by the *Darogha*. When the strike took place the *Darogha* came to us to enquire the cause. We told him that it was against the religion of a Sikh to wear cap and as Megh Singh was given a cap so the strike had taken place. The *Darogha* replied that if assurance was given that the punishment of Megh Singh had been removed, then would the strike come to an end? The political prisoners held a consultation and said that if the cause be removed they would take their food. After few hours one Assistant Jailor took Tara Singh, political prisoner, to Megh Singh and satisfied him that all punishments had been removed. The strike was over. It was also reported to us that hairs of beard have been pulled out." From this witness' evidence it becomes apparent

that the information received by the political prisoners as to the ill treatment of Megh Singh was that he had been condemned to wear gunny clothing and a cap and was put in bar fetters, and as soon as this grievance had been remedied—presumably by the removal of the bar-fetters and the substitution of other clothing—the strike at once came to an end.

The evidence of Autar Singh as to the cause of the strike is very much to the same effect. He says "Megh Singh prisoner was given the punishment of cross-bar-fetters. I did not go on hunger-strike. My companions did not go on hunger-strike. We requested the Jailor to bring military Sikh prisoners to our ward as the charge against them was political or semi-political. Megh Singh was also given gunny clothing. The other reason for hunger-strike was that the other prisoners should also be allowed to shout "*Sat Sri Akal.*" Respecting Megh Singh our demand was that his gunny clothing and cross-bar-fetters should be removed. The *Darogha* came to our ward and master Sundar Singh (I think) had a talk about Megh Singh with him in my presence. It was said that Megh Singh should be relieved from the cell where he had been confined and his punishment of cross-bar-fetters and gunny bags should be removed. The *Darogha* had simply said that Megh Singh had violated Jail Regulations." In conclusion of his examination-in-chief he said: "The *Darogha* said that he would remove Megh Singh's fetters and clothing. We deputed Tara Singh prisoner in the Manak case. He was deputed by the strikers whether Megh Singh's fetters were removed or not. He came back and told the strikers that Megh Singh's fetters had been removed. I think Lala Lajpat Rai intervened in putting an end to the strike and in advising the Jailor."

According to Dr. Narang these two witnesses, Lala Lajpat Rai and Sardar Autar Singh, both members of the legal profession, are persons whose word should be taken as truth. He says that they are men of social position and that Lala Lajpat Rai also occupies a position of some political eminence. So far as their evidence is concerned it seems to me to be given fairly and honestly and the effect of it, in my opinion, is conclusive to show that the strike was not due to an alleged savage attack upon Megh Singh, but was due to certain legitimate disciplinary action taken by the Jail authorities, to which the political prisoners objected. As to the witness Tara Singh, not only does his evidence contradict in many details that of Megh Singh, but his character does not appear to entitle him to much belief in a suit of this kind. He admits that he was sentenced to six years' imprisonment in the Manak Gurdwara case and to five years' imprisonment in a conspiracy case. He served in China as a Police Constable for some 13 years, and is now undergoing an unexpired term of imprisonment.

After examining the whole of the evidence it seems to me that no Jury could reasonably come to the conclusion that the statement published in the respondents' newspaper has been proved to be true.

It is to be observed that when a newspaper publishes a dafamatory statement charging a person with conduct which, if true, would render him liable to a criminal prosecution, and subsequently attempts to justify such a charge, the facts charged must be proved with the same degree of precision as would be required in a prosecution on foot of such a charge. In other words, in a libel suit such as this, imputing conduct to the plaintiff which would render him liable to criminal proceedings, the benefit of any doubt as to the truth of the allegations complained of must be given not to the defence but to the plaintiff. The trial Judge has taken the exact opposite course. Having admitted every kind of hearsay evidence to prove the cause of the strike in the Jail, he concludes that the reason alleged to have been given by the strikers for the strike is sufficient to establish the fact that Megh Singh had been beaten for shouting *Sat Sri Akal.* He has given no weight whatsoever to the glaring inconsistencies in the statements of the different witnesses. The fact that the witness Tara Singh admitted in cross-examination that before the strike the *Darógha* raised no objection to such shouts, is entirely overlooked by the trial Judge. It is unnecessary to compare the many discrepancies in the stories told by the different defence witnesses. But it seems to me a very strange thing that the Judge who heard the witnesses does not appear to have allowed such discrepancies to affect his conclusion. He comments on the fact that the appellant and his witness Abdul Ghani did not produce any documentary evidence in corroboration of the evidence as to the

date when the strike took place. But surely the Judge must know that when the onus of establishing the truth of certain facts is put upon the defence it is for them to call for documents in support of their story. Had the defence required the production of any documents from the Jail they could easily have obtained them by an order from the Court. In point of fact, as I have already said, the date of the strike does not appear to have been disputed. If any facts can be said to be clearly established by the evidence in this case, they are these:—The publication complained of took place on the 15th of February. In that publication it was alleged that Megh Singh was cruelly treated on the 9th of February. The strike which took place in the Jail occurred not earlier than the 24th of February. These facts the trial Judge seems to have wilfully ignored, or, rather, when they come in conflict with the evidence of the defence witnesses he prefers the statements of these witnesses though they are in absolute contradiction to these three salient facts.

The frame of mind of the trial Judge is best shown by some observations which appear towards the close of his judgment. The plaintiff, he says, could have produced documentary evidence to discredit the defence story. He also says that plaintiff could have produced evidence to show when Gurdit Singh was transferred from Lahore Jail during the strike. He further states that the plaintiff could easily have produced evidence as to the admission of certain prisoners to the Jail during the strike. All these matters of evidence would have established when the strike took place. That, no doubt, is perfectly true, but the Judge entirely forgets that it was for the defence to prove their case, and in view of the fact that neither the plaintiff nor the Deputy Jailor Abdul Ghani were asked one word in cross-examination suggesting any doubt as to the accuracy of the date fixed by them for the strike, I fail to understand why the Judge seems to think it necessary that they should have produced a whole heap more evidence to establish this uncontradicted fact.

Following this criticism the trial Judge continues: "Non-production of best evidence in possession of the plaintiff raises presumption against him," and then he goes on to say that "the dates are quite immaterial in the case. The story of the beating of the prisoner is substantially true." To this I need only say that the plaintiff has produced not only the best but the only proper evidence in the case, namely, his own oral statement on oath in Court and the oral statements of his witnesses upon oath in Court. If there were any documents available to contradict this evidence it was for the defence to demand them. But why a witness whose own testimony upon a particular point has not even been challenged should be required to produce documents to corroborate that piece of testimony, I quite fail to understand.

The trial Judge concludes his judgment with these words:—

"The defendants published what news they got. It is the duty of a journalist to bring to the notice of the Government such complaints against their servants. I have not referred to the statement of Malik Lal Khan to the effect that plaintiff hesitated to bring this suit. I need not say anything about it. To publish true facts against a person in the interest of the public and of Government is not defamation."

With regard to these observations I may say that it is the duty of a journalist only to publish complaints which he is satisfied are true. If he publishes complaints of a defamatory nature which are not true, he must suffer the consequences. A journalist who publishes a statement about an individual is in the eye of the law precisely in the same position as any other person. He is not specially privileged as to what he may say. But, on the other hand, he undoubtedly has a greater responsibility to guard against untruths, for the simple reason that his utterances have a far larger publication than have the utterances of the individual, and they are more likely to be believed by the ignorant by reason of their appearing in print.

Having heard the entire evidence minutely dissected by Counsel on both sides, it is perfectly clear to my mind that the respondents have signally failed to prove that the defamatory words are true, and accordingly the plea of justification has failed. And in this regard I may point out that even if it has been established that the plaintiff had caused the prisoner Megh Singh to be beaten in the manner alleged by Megh Singh himself, this would not establish the plea of justification and entitle the respondents to a verdict. In order to

succeed upon the plea of justification the defendants have to prove that the whole of the dafamatory matter is substantially true. It is not enough under the plea of justification of all the matters set out in a libellous publication to prove that some of them are true. When two persons are alleged to have been savagely beaten, it is not enough to prove that one person was in fact so beaten. And, accordingly, if in the present case it had in fact been proved that Megh Singh had been ill-treated in the manner alleged in the offending newspaper paragraph, that would not be sufficient to establish the plea of justification, and the appellant would even on that finding be entitled to a verdict. Such a verdict, however, would hardly entitle him to more than contemptuous damages. But in the present case, in my opinion, the respondents have wholly failed to prove that any of the libellous matter is true, and accordingly the appellant is entitled to substantial damages.

No rule can be laid down for measuring these damages. Dr. Narang has cited a number of cases in some of which only a small sum was awarded for gross libels, but such cases are not of the slightest use as a guide The cases in question were only reported because of some principle of law which they were supposed to establish. There have been countless trials for libel, in which substantial sums have been awarded to the plaintiff, which have never been reported in the Law Reports. Obviously each case must depend upon its own particular facts. In the present case the libel complained of is a savage, gross and vindictive one, and has been persisted in up to the present moment. Although the respondents deliberately pleaded the dangerous plea of justification, they never attempted to go into the witness box and support that plea under oath.

It may be true, as Dr. Narang declares, that the respondents' newspaper is an insignificant journal of no consequence. That may be so, but nevertheless a statement defaming a Government servant, even when published in most contemptible journal will most certainly come to the knowledge of the authorities, and the position of the person defamed must necessarily be imperilled unless he can secure either a complete retraction of the libel or establish his innocence in an action at law.

I am of opinion that the smallest sum which should be awarded to the appellant as damages is a sum of Rs 2,000 and I would accordingly set aside the judgment and decree of the trial Judge and enter judgment for the appellant for the sum of Rs. 2,000 with costs throughout.

Campbell, J.—I agree. So far from the dates being "quite immaterial" as declared by the trial Judge they are the most important feature of the case. The assault upon Megh Singh is stated in the offending article to have occurred on the 9th May. The article was published upon the 15th May. The hunger-strike commenced on the 24th. Megh Singh was produced by the defence to prove that he was beaten and another prisoner, Tara Singh, was produced to corroborate him by describing an interview which took place between them on the morning after the beating. Read together, and if believed, the two statements would prove nothing more than a beating, which took place after the 24th May, the date of the commencement of the hunger-strike, and which, if it did take place, is quite irrelevant to the present proceedings.

The trial Judge appears to have believed the story of certain witnesses that a rumour of Megh Singh having been beaten was prevalent at the commencement of the strike, and to have regarded the existence of a rumour as corroborative evidence of Megh Singh's statement. In any case the existence of a rumour can never be any proof whatsoever of its correctness, and in the present instance the trial Judge has disregarded the fact that the publication of the defendants' article on the 15th would be quite enough to account for the currency of the rumour on the 24th.

The only thing on the record from which the defence can claim any support is Megh Singh's statement with all references to an interview with Tara Singh eliminated from it, and this is quite inadequate to establish their case.

I concur in holding that the plaintiff should have a decree for Rs. 2,000 with costs on this amount throughout.

R. L. *Appeal accepted.*

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 82 OF 1925.

June 14, 1926.

Present:—Mr. Justice Fawcett and Mr. Justice Madgavkar.

MAHARAJ BHANUDAS NARAYANBOA GOSAVI—PLAINTIFF—APPELLANT

versus

KRISHNABAI CHINTAMAN DESHPANDE—DEFENDANTS NOS. 1 AND 2—RESPONDENTS.

Evidence Act (I of 1872), ss. 35, 74, 78, 114—Certified copy of transfer certificate granted by Head Master of Native State, admissibility of—Head Master, whether 'executive officer'—'Diplomatic agent', meaning of—Certified copies of Foreign States, admissibility of—Presumption as to character of certificates—Minor—Compromise by guardian with sanction of Court—Setting aside compromise, grounds for—Fraud, whether necessary.

A certified copy of a 'transfer certificate' granted to a pupil by the Head Master of a School is admissible in evidence under s. 35 of the Evidence Act to prove the age of the pupil [p. 307, col. 2.]

If the Government of a State or country undertakes the education of boys and girls and employs officers for that purpose, then the officers so employed are executing certain duties imposed upon them by that State or country, and they come within the term 'executive officers' as used in s. 74 (1) (*iii*) of the Evidence Act. [p. 308, col. 1.]

Section 35 of the Evidence Act is applicable also to entries in public documents of Native States and foreign countries. [*ibid.*]

The term 'diplomatic agent' in s. 78, cl. (6) of the Evidence Act is used in a wide sense and *prima facie* includes the Resident of Hyderabad. [*ibid.*]

A Court can presume under s. 114 of the Evidence Act that a transfer certificate granted by the Head Master of a School in a Native State has the same character as a school leaving certificate in British India. [*ibid.*]

A compromise of a suit by a guardian with the sanction of the Court under O. XXXII, C. P. C., stands on a very different footing to compromise by guardians out of Court and cannot be set aside merely on the allegation that the compromise was not in the interests of the minor or was unconscionable. To impeach such a compromise there must be something amounting to fraud. [p. 309, col. 1.]

Dhairyasingh Gordhandas v. *Kissandas Tribhovandas* (2), *Brooke* v. *Lord Mostyn* (3) and *Bibi Solomon* v. *Abdool Azeez* (4), relied on.

First appeal from the decision of the First Class Subordinate Judge at Ahmednagar, in Suit No. 737 of 1921.

Mr. *P. V. Kane*, for the Appellant.

Mr. *S. Y. Abhyankar*, for Respondent No. 1.

JUDGMENT.

Fawcett, J.—The main question in this appeal is, whether the plaintiff has proved that he attained majority within three years of his filing the present suit, that is to say, on or after July 18, 1918. This involves his birth on or after July 18, 1899. But the Subordinate Judge has held that he was really born on October 20, 1899, and, therefore, his suit was time-barred.

In regard to the evidence as to the plaintiff's age, it has been strongly contended that the document marked A, on which the lower Court has mainly relied, is not admissible in evidence. This is a document purporting to be a certified copy of what is called a "transfer certificate" granted by the Head Master of a school at Paithan in the Hyderabad State, on January 20, 1916. The document purports to be a copy of a counterfoil, showing the contents of the transfer certificate actually issued, and the copy is made on a printed form, which would presumably correspond to that of the original. According to an entry in this transfer certificate, the birth of the plaintiff is given as on a Muhammadan date, which, it is not disputed, corresponds to October 20, 1899. Since the certified copy was given, the document has been presented to the Resident, Hyderabad, and now bears a certificate, dated October 26 1922, of the Resident, certifying that the document is a copy of a public document of the Hyderabad State duly certified by the officer having the legal custody of the original. The Subordinate Judge held that the document was admissible under ss. 35 and 79 of the Evidence Act. As regards s. 35 Mr. Kane contends that this cannot cover a "public servant" outside British India, and cites in support of this the doubt expressed in *Ponnammal* v. *Sundaram Pillai* (1). That section itself, however, refers to the law of the country in which such book, or register is kept; and that would be quite unnecessary, if it was intended to cover only cases of entries in a public or official book, register, or record kept in British India. Moreover, under s. 74 (1) (*iii*) the expression "public documents" includes "documents forming the acts, or records of the acts of public officers, legislative, judicial and executive, whether of British India, or of any other part of His Majesty's dominions, or of a foreign country." Therefore, the Act covers public documents of Native States or foreign countries. I can see no reason why s. 35 should not have a similar scope, especially in view of the words to which I have drawn attention. It is said that a schoolmaster will not come under the words

(1) 23 M. 499 at p. 503; 10 M. L. J. 310; 8 Ind. Dec. (N. S.) 7

"public officers, legislative, judicial and executive." I do not agree with that contention. If the Government of a State or country undertakes the education of boys and girls, and employs officers for that purpose, then the officers so employed are executing certain duties imposed upon them by the State or country, and they certainly seem to me to come within the meaning of the words "executive officers." The document in question corresponds to the certicate given in British Indian Schools, when a pupil leaves a school; and it can, I think, under s. 114 of the Evidence Act, be safely presumed that a school-master in Hyderabad State issues a similar certificate, especially having regard to the certificate of the Resident at Hyderabad that I have mentioned. That certificate falls under cl. (6) of s. 78 of the Evidence Act, as being "a certiffcate under the seal of a diplomatic agent that the copy is duly certified by the officer having the legal custody of the original." The words "diplomatic agent" are very wide, and *prima facie* cover the Resident of Hyderabad, who is the Political Agent of the Government of India. Thus, in s. 86 it is laid down that the Political Agent shall be deemed to be the representative of the Government of India in the place or country to which he is assigned. It has been objected that s. 76 requires proof of the character of the document according to the law of the foreign country, and that there has been no evidence given as to the character of this document. That might be a serious objection in the case of a document as to which a doubt could legitimately arise on the subject of its character. But, in the present case, there is no room for such a doubt, and the Court can presume under s. 114 that it has the same character as a school leaving certificate in British India. In my opinion, therefore, the lower Court has not erred in admitting this document in evidence.

The next question is, whether the lower Court was wrong in relying upon this document, and whether it should be given the weight which the lower Court attached to it. Against this document the plaintiff adduced evidence that he was really born on June 30, 1901. This evidence consists of a horoscope and a note made in an almanack about the plaintiff's birth on that date, together with oral testimony in support of those documents, but this has been disbelieved by the lower Court. Certainly, one very strong ground for not accepting the testimony is the definite statement in the plaint itself that the plaintiff attained majority on November 30, 1918; that implies he was born on November 30, 1900, and the inference of the lower Court that the horoscope had not seen the light of the day, when the plaint was prepared, is one that can reasonably be made. Another circumstance which goes against this evidence is the fact that in the compromise application of February 14, 1916, to which the plaintiff's natural father Keshav was a party, the plaintiff's age was stated to be sixteen. If he had been born on June 30, 1901, he would then have been under fifteen (about $14\frac{3}{4}$), and it seems very improbable that the plaintiff's natural father would, in those circumstances, have stated that he was sixteen years of age. On the other hand, if he was really born in the latter part of 1899, or the first part of 1900, the statement that his age was sixteen in February, 1916, would be correct. The learned Subordinate Judge had the advantage of having seen the witnesses, and, in view of the above circumstances, I do not think that there are adequate grounds for our differing from his view and his appreciation of the evidence adduced by the plaintiff. The burden of proof that he attained majority within three years of the suit rests upon the plaintiff, and I think there is good ground for relying upon this document, Ex. A. It gives a definite date of birth, so that it must have been based upon specific information, and presumably that information would be supplied by the natural father of the plaintiff. That is corroborated by the fact that in this document the father's name is given as Keshav, with a note that it was subsequently altered to Narayan, which, no doubt, was done after the plaintiff's adoption.

For the above reasons, I do not think that there are any sufficient grounds for our differing from the conclusion of the lower Court that the plaintiff was born in October, 1899. Admittedly, that would make his suit time-barred as regards his prayer for setting aside the decree of the lower Court, as having been obtained fraudulently and collusively. But, it is contended by Mr. Kane that the relief asked for in cl. (*b*) of para. 7 of the plaint is

one for which law allows an action to be brought within six years. This is that it should be declared that the said decree, being opposed to the interest of the minor and being unconscionable, is not binding on the plaintiff. It is contended that this relief, not being covered by Art. 95 of the Limitation Act, will fall under Art. 120, and that, as the compromise decree was obtained in 1916, the suit, which was brought in July, 1921, would, in any case, be in time. There is, however, an obvious answer to this argument. This is not a case of a compromise by the guardian of a Hindu minor made out of Court and based simply on his own powers as guardian. It is a compromise, which was submitted for sanction of the Court under O. XXXII, C. P. C., and the case of such a compromise stands on a very different footing to the other class of compromise that I have mentioned. A compromise, sanctioned by a Court, cannot be set aside merely on the allegation that the compromise was not in the interest of the minor and was unconscionable. The Court has to consider the question whether the compromise is for the benefit of the minor before it sanctions it. In the present case there is an exhibit, which shows that the Judge did go into this question whether the compromise was for the benefit of the minor. There has been a recent decision of this Court in regard to setting aside of a compromise sanctioned by the Court: *Dhairyasingh Gordhandas* v. *Kissandas Tribhovandas* (2). In that case a reference has been made to an English authority, *Brooke* v. *Lord Mostyn* (3), which lays down that to impeach such a compromise there must be something amounting to fraud, before the Court will set it aside. Mr. Justice Marten in his judgment at page 369*, no doubt, does not decide that the law in India is exactly as there laid down, and says it may be that it is stated rather too widely against those who are interested in setting aside a compromise. But, on the other hand, he distinctly implies that a compromise could not be set aside merely on a contention that it was not for the benefit of the minor, and says (page 354*) that that point was not even argued by Mr. Coltman. At page 375* my learned brother in his judgment summarises the law as being that culpable or wilful negligence tantamount to fraud or misrepresentation on material facts would alone enable the minors to avoid the compromise sanctioned. This view that there must be something in the nature of fraud practised upon the Court, is supported by *Bibi Solomon* v. *Abdool Azeez* (4), where the Court held that the compromise was entered into by the parties, and sanctioned by the Court, under a serious misapprehension of material facts, caused by actual fraud, or at any rate by culpable neglect of duty. There must be something of that kind shown before a compromise sanctioned by a Court can be set aside. In the present case, the contention that the compromise itself is not for the benefit of the minor virtually amounts to appealing against the declaration of the Subordinate Judge that it really was for his benefit, and a suit for that purpose does not lie. Therefore, the mere fact that this prayer is made in the plaint does not prevent the suit being time-barred. The only material relief which could be granted is that asked for in cl. (*a*) of para. 7. Accordingly, I would dismiss the appeal with costs.

Madgavkar, J.– I agree.

A. N. A. *Appeal dismissed.*

(2) 94 Ind. Cas. 104; 28 Bom. L. R. 362; A. I. R. 1926 Bom. 291.

(3) (1864) 2 DeG. J. & S. 373; 34 L. J. Ch. 65; 10 Jur. (N. S.) 1114; 11 L. T. 392; 13 W. R. 1115; 46 E. R. 419; 139 R. R. 134.

*Pages of 28 Bom. L. R.—[*Ed.*]

(4) 6 C. 687; 8 C. L. R. 169; 3 Ind. Dec. (N. S.) 446.

*Page of 28 Bom. L. R.—[*Ed.*]

RANGOON HIGH COURT.

SECOND CIVIL APPEAL No. 589 OF 1925.

August 10, 1926.

Present:—Mr. Justice Mya Bu.

CO-OPERATIVE TOWN BANK OF PADIGON—PLAINTIFFS—APPELLANTS

versus

S. V. K. V. RAMAN CHETTYAR AND ANOTHER—DEFENDANTS—RESPONDENTS.

C. P. C. (Act V of 1908), O. XXI, rr. 16, 53—Transfer of decree—Transferee, rights of—Creditor of decree-holder realising amount due under decree—Transferee, whether entitled to claim refund.

The transferee of a decree primarily acquires merely the right to execute the decree, and does not acquire a right to the amount covered by the decree. [p. 312, col. 1.]

The transferee of a decree who fails to execute it is not, therefore, entitled to claim a refund from a creditor of the decree-holder who attaches the decree and realises the amount due thereunder in execution of his decree against the transferor. [*ibid.*]

Mr. *Thein Maung*, for the Appellants.

Mr. *Chari*, for the Respondents.

JUDGMENT.—In Civil Regular No. 67 of 1922 of the Sub-Divisional Court of Paungde, the 2nd defendant obtained a decree against one Maung Po Hlaing for Rs. 3,150. Execution of that decree was taken out in Civil Execution No. 56 of 1923 of the Sub Divisional Court resulting in the case being closed on the 26th of September 1924 on a compromise whereby it was agreed to accept Rs. 2,700 in full satisfaction of the decretal amount and one Ma Byu became the judgment-debtor, Maung Po Hlaing's surety for the payment of the sum in or before the month of Tabaung 1286 B.E., that is, roughly, March 1925. On the 12th December 1924, the 2nd defendant transferred to the plaintiffs the decree obtained by him in Civil Regular No. 67 of 1922.

On the 15th January, 1925, the 1st defendant instituted Civil Execution No. 4 of 1925 for execution of the decree which they have obtained against the 2nd defendant in Civil Regular No. 50 of 1924 of the same Court and obtained attachment of the 2nd defendant's decree against Maung Po Hlaing. On the 21st March, 1925, the said Ma Pyu made payment of Rs. 2,700 into Court in satisfaction of the decree against Maung Po Hlaing on the basis of the above-mentioned compromise. This amount was withdrawn by the 1st defendant on the 23rd March, 1925, when the execution case was closed.

The plaintiffs-appellants' suit is for recovery of that sum of Rs. 2,700 from the 1st defendant.

It must be borne in mind that since the taking of the assignment the plaintiff Bank took no steps whatsoever until the institution of this suit to execute the decree or to have the transfer of the decree recognised by the Court.

The Court of first instance and also the lower Appellate Court have dismissed the suit on the grounds that a decree-holder is *prima facie* entitled to execute a decree and that an application for execution of the decree by him cannot be resisted by the judgment-debtor on the ground that the decree has been transferred to a third party so long as the transferee has neither appeared nor applied to execute the decree. I have examined the cases quoted by them and I see no reason for disagreeing with the views expressed therein.

There is nothing at all to show that a ansferee of a decree obtained primarily any more than a right to take out execution of the decree. If he does take out such execuion he is then entitled to the benefits that may arise from his action.

The contention put forward on behalf of the plaintiffs amounts to this, that by virtue merely of the transfer of a decree the transferee became entitled to the very sum of money mentioned therein. I fail to find anything to support this contention. The ruling in *Sadagopachariar* v. *Ragunada Chariar* (1), relied on by the learned Counsel for the plaintiffs-appellants, does not go far enough to support his case and deals with quite a different question altogether.

On the other hand, I can add the weight of the decisions in *Jasoda Deye* v. *Kirtibash Das* (2), *Jagat Tarini Dasi* v. *Rakhal Chandra Tewary* (3), *Silu Peda Yelligadu* v. *Surya Rao Bahadur Zemindar Garu* (4) and *Hari Krishnamurthi* v. *Akella Suryanaryana Murthi* (5) in support of the proposition that it is the decree-holder on record who is entitled to execute the decree. It then follows that the transferee of a decree will be entitled to execute the same only when he has been brought on the record and the transferee will be entitled to the benefits arising from the execution only when he takes out execution of the decree. I entirely fail to see how the plaintiffs-appellants in this case can succeed in their claim to be entitled to the sum of Rs. 2,700 which the 1st defendant Chettyar drew out of Court.

In the result, the appeal fails and it is hereby dismissed with costs.

A. N. A. *Appeal dismissed.*

(1) 3 Ind. Cas. 938; 33 M. 62; 6 M. L. T. 273.
(2) 18 C. 639; 9 Ind. Dec. (N. S.) 426.
(3) 3 Ind. Cas. 324; 10 C. L. J. 396; 14 C. W. N. 752.
(4) 31 Ind. Cas 542; 18 M. L. T. 494; 2 L. W. 112 29 M. L. J. 693; (1916) 1 M. W. N. 119.
(5) 57 Ind. Cas. 753; 38 M. L. J. 271; 43 M. 424; (1920) M. W. N 395; 27 M. L. T. 337.

BOMBAY HIGH COURT.

CIVIL REFERENCE No. 1 OF 1926.

July 2, 1926

Present:—Mr. Justice Fawcett and Mr. Justice Madgavkar.

THE COLLECTOR OF SATARA—APPLICANT

versus

MAHADU RAGHU KADAM—OPPONENT.

Dekkhan Agriculturists' Relief Act (XVII of 1879),

s. 22—Cr. P. C. (Act V of 1898), s. 386 (3)—Fine, recovery of—Immoveable property of agriculturist, whether can be sold.

Immoveable property of an agriculturist can be attached and sold in execution of an order passed under s. 386, sub-s. (3) of the Cr. P C. as amended in 1923. The mere fact that the warrant in such a case is executable as if it were a decree does not make the provisions of s. 22 of the Dekkhan Agriculturists' Relief Act applicable to such a warrant. [p. 311, col. 1.]

Shivayagappa Sangappa v. *Govindappa Pandappa* (1), *Kishandas Shivram Marwadi* v. *Nama Rama Vir* (2) and *Gangadhar Sahkaram* v. *Mahadu Santaji* (3), relied on.

Per *Fawcett, J.*—The words 'an order' in s. 22 of the said Act must be read, with the preceding words in execution of' and so read, they must be limited to an order capable of execution in the ordinary way. [p. 312, col. 1.]

Civil Reference made by the Joint Subordinate Judge, Karad.

Mr. *S. S. Patkar*, Government Pleader, for the Applicant.

Mr. *Y. N. Nadkarni*, for the Opponent.

JUDGMENT.

Fawcett, J.—The point that has been referred to us by the Subordinate Judge is, whether, in view of s. 22 of the Dekkhan Agriculturists' Relief Act, the immoveable property of an agriculturist can be attached and sold in execution of an order passed under s. 386 of the Cr. P. C., as amended in 1923. In my opinion, the answer should be in the affirmative. Section 386, sub-s. (3), Cr. P. C., only applies the provisions of the C. P. C., as to execution of decrees, and there is nothing in the Code itself which involves the application of s. 22 of the Dekkhan Agriculturists' Relief Act. The claim to the benefit of that section is one which can only be made by the judgment-debtor himself on the ground that he is an agriculturist, and it is not a claim or objection that would fall under the provisions of O. XXI, rr. 97 to 103, of the C. P. C. The argument, however, that, inasmuch as the warrant is to be deemed to be a decree under the sub section, the provisions of s. 22 of the Dekkhan Agriculturists' Relief Act apply *ipso facto*, is one that requires serious consideration. The section itself extends to immoveable property belonging to an agriculturist which it is proposed to attach or sell "in execution of any decree or order passed whether before or after this Act came into force," and it is contended that this, therefore, applies to what under s. 386, sub-s. (3), is deemed to be a decree. Obviously, the section mainly has reference to decrees which are passed in the ordinary way in suits to which an agriculturist is a party, falling under the Dekkhan Agriculturists' Relief Act; and, in my opinion, the mere fact that the warrant is executable as if it were a decree does not suffice to make the provisions of s. 22 of the Dekkhan Agriculturists' Relief Act applicable to such a warrant. In support of this, I would refer to the case of *Shivayagappa Sangappa* v. *Govindappa Pandappa* (1). There had been cases in which this Court held that, if there was a compromise decree containing a provision to the effect that, on default of payment of so many instalments, the whole mortgaged property should be liable to sale, such compromise decree contravened the provisions of s. 15-B of the Dekkhan Agriculturists' Relief Act, and was, therefore, void: see, for instance, *Kishandas Shivram Marwadi* v. *Nama Rama Vir* (2). The question, however, was subsequently referred to a Full Bench, and the latter held that a compromise in a suit, which came under the Dekkhan Agriculturists' Relief Act, was not bad in law because it was made without compliance with the special provisions (s. 15-B) of that Act. In the course of his judgment, Scott, C. J., referring to s. 15 B, says (page 620*):—

"There is nothing to show that the Legislature intended that the provisions of that section should be applied by analogy wherever a compromise is entered into, which is to be recorded by the Court and to form the basis of a consent decree. As Mr. Justice West observed in *Gangadhar Sakharam* v. *Mahadu Santaji* (3) it is a general principle 'that exceptional provisions are not to receive a development to all their logical consequences contrary to the general principles of the law.' Here we are asked to extend by analogy the provisions of a special section contrary to the general principles expressed in O. XXIII, r. 3. A compromise which is made by parties who are *sui juris* should be given effect to. We do not think that there is anything unlawful in the compromise or contrary to public policy."

I think that the principle expressed by West, J., applies in the present case, and the

(1) 20 Ind. Cas. 969; 37 B. 614; 15 Bom. L. R. 768 (F. B.).

(2) 8 Ind. Cas. 651; 35 B. 190; 12 Bom. L. R. 1024.

(3) 8 B. 20 at p. 24; 8 Ind. Jur. 201; 4 Ind. Dec. N. s) 388.

*Page of 37 B.—[*Ed.*]

Court will not be justified in saying that because a warrant under s. 386, sub-s. (3), is to be deemed a decree, therefore, the exceptional provisions of s. 22 of the Dekkhan Agriculturists' Relief Act must be held applicable to such a warrant. I may also refer to a case which came before me as Judicial Commissioner in Sind. It was one in which an award had been passed in favour of persons who sought to have the immoveable property of the debtors sold in execution of the award. The debtors raised the objection that they were agriculturists and that the immoveable property was exempt from attachment and sale under s. 22 of the Dekkhan Agriculturists' Relief Act. I held that an application to execute an award could not be deemed to be an application in execution of an order under s. 22 of the Dekkhan Agriculturists' Relief Act. I considered that when s. 22 spoke of "an order" the words must be read with the preceding words "in execution of" and, so read, they must be limited to an order capable of execution in the ordinary way. And, accordingly, I thought that an application to execute the award could not be deemed to be an application "in execution of an order" within the meaning of s. 22 of the Dekkhan Agriculturists' Relief Act: *Udhavdas* v. *Ukamal Phatamal* (4). I think, therefore, that the warrant in this case is executable by attachment and sale of the immoveable property in question, in spite of the fact that Mahadu, who was fined, is an agriculturist.

Madgavkar, J.—I agree. The answer to the Reference is, in my opinion, in the affirmative, as the immoveable property can be attached. The warrant of fine of a Criminal Court, issued under s. 386 (3), Cr. P. C., when sent to the Collector, is to be deemed to be a decree, and the Collector to be deemed to be the decree-holder for the purpose of execution under the C. P. C. It does not, therefore, follow that a warrant is a decree or an order within the meaning of s. 22 of the Dekkhan Agriculturists' Relief Act. Section 386 (3) merely provides a means for execution of a warrant of fine through a Civil Court. It remains as a warrant of a Criminal Court and does not become a decree of the Civil Court to which the Dekkhan Agriculturists' Relief Act in general, or s. 22 in particular, would apply. The answer to the Reference should, therefore, be in the affirmative.

(4) 60 Ind. Cas. 942; 14 S. L. R. 217.

Per Curiam.—A copy of our judgments should be sent under the signature of the Registrar to the Court by which the Reference was made.

The costs of the Reference, under O. XLVI, r. 4, to be costs in the cause.

A. N. A. *Reference answered accordingly.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1277 OF 1923.

August 20, 1926.

Present:—Mr. Justice Devadoss and Mr. Justice Wallace.

RAMANUJACHARIAR—PLAINTIFF—APPELLANT

versus

SUNDARACHARIAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 142, 144—Suit for possession based on allegation of expiry of tenancy—Defendant setting up adverse possession—Limitation.

Art. 142, Limitation Act, is applicable only to cases where the plaintiff alleges possession and dispossession in his plaint. Where he sets up a tenancy or license as the basis of the defendant's possession, the proper Article applicable is Art. 144 and the plaintiff is not bound to prove possession within 12 years of the suit. The onus is on the defendant to prove adverse possession.

Second appeal against a decree of the Court of the Subordinate Judge, Vellore, in A. S. No. 8 of 1923, preferred against that of the Court of the District Munsif, Ranipet, in O. S. No. 969 of 1919.

JUDGMENT.—The only point urged before us is one of limitation. The Subordinate Judge has dismissed the plaintiff's suit on the ground that Art. 142 of the Limitation Act applied to the case, and the plaintiff not having proved possession within 12 years, his suit was barred. The plaintiff did not allege in the plaint that he was dispossessed by the defendants. His case was that he let the defendants into possession under an agreement of tenancy and that they would not give up possession. The defendants denied plaintiff's title and set up title by adverse possession for over 12 years. The District Munsif granted a decree in favour of the plaintiff, but the Subordinate Judge on appeal held that the plaintiff failed to prove his possession within 12 years of the suit.

Article 142 is applicable only to cases

where the plaintiff alleges possession and dispossession in his plaint. Where he sets up a tenancy or license as the basis of the defendants' possession the proper Article applicable would be Art. 144. If the defendants are able to make out adverse possession for over 12 years, the plaintiff's suit would be barred. Here the learned Subordinate Judge found that the agreement set up was not proved. But he has not found on the evidence that the defendants were in adverse possession for over 12 years. He says,

"If the defendants had been in possession on 25th July, 1907, the suit would be barred. I consider that the evidence has not established that the plaintiff was in possession within the statutory period."

In this case the plaintiff is not bound to prove possession within 12 years. We, therefore, set aside the decree of the Subordinate Judge and direct him to restore the appeal to file and dispose of it after recording finding on Issue No. 4. If the finding be that the defendants have been in adverse possession for over 12 years the plaintiff's suit would be barred. If the Subordinate Judge is not able to arrive at the finding that the defendants have been in adverse possession for over 12 years, the plaintiff ought to succeed.

Costs will abide the result.

V. N. V. *Appeal allowed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 37B OF 1925.

October 28, 1926.

Present:—Mr. Mitchell, A. J. C.

ZINGRAJI DHANGAR—PLAINTIFF—APPELLANT

versus

NAGOSA KALAL—DEFENDANT—RESPONDENT.

Contract Act (IX of 1872), s. 73—Sale of land—Damages for breach of covenant of title, measure of—Damages, whether to be assessed on value of property at the date of purchase or on eviction—Costs of improvement—Claim, when to be decreed and against whom—Transfer of Property Act (IV of 1882), s. 51.

A purchaser who is evicted from the property purchased is entitled to recover from his vendor who has guaranteed his title, the value of the property at the date of purchase and not at the date of eviction. [p. 314, col. 1.]

Nagardas Saubhagyadas v. *Ahmedkhan* (1), not followed.

Mohammad Razzak v. *Amrutrao* (2), followed.

In the absence of a definite agreement in the sale-deed that the vendor will be liable to indemnify the purchaser for the loss of amounts spent on improvements, the vendor is not liable to make good the loss on eviction of the purchaser by a person claiming a paramount title unless he is personally benefited by the sale being set aside. [p. 315, col. 2.]

The purchaser is, however, entitled to claim the value of the improvements under s. 51 of the Transfer of Property Act, from the persons who have been benefited by those improvements if he can establish that he acted in good faith under the genuine belief that his title was good. [*ibid.*]

Appeal against a decree of the Sub-Judge, First Class, Amraoti, in Civil Suit No. 37 of 1924, dated the 25th February, 1925.

Mr. *M. B. Niyogi*, for the Appellant.

Mr. *A. V. Khare*, for the Respondent.

JUDGMENT.—Dhansa Kalar of Kamaljapur died in 1907, and his wife *Musammat* Ananda took his lands in widow's estate. On 16th April, 1908, she sold Survey No. 2/1 to Nagosa of Hartoli for Rs. 700. On 5th June, 1908, she sold survey No. 6 to the same Nagosa for Rs. 500. On 29th April, 1911, Nagosa sold both these fields to Zingraji of Kamaljapur by a sale-deed which referred specifically to the previous sale-deeds, giving their serial numbers in the books of the Registration Office. The sale-deed professed to convey a full and unlimited title in the fields, and it contained an indemnity clause to the effect that if any one should make a claim Nagosa would be responsible for it and Zingraji would not be put to any expense thereby. As Zingraji lived in Kamaljapur, where the fields are situated and where Dhansa lived and died, and as Nagosa's own title-deeds were clearly cited in the sale-deed, it cannot be doubted that Zingraji knew that he was buying from Nagosa landed property which Nagosa had bought from a widow who had inherited it from her husband; and indeed this fact was definitely pleaded by Nagosa and not denied by Zingraji.

Ananda died about twelve years later, and her reversioners sued both Nagosa and Zingraji for possession of these fields, in Suit No. 127 of 1923 in the Court of the Subordinate Judge, Amraoti. They got a decree on 4th February, 1924, and obtained possession of the fields from Zingraji on 3rd May, 1924.

Zingraji now sues Nagosa for compensation for the loss of his fields. The lower Court decided that Zingraji was entitled to compensation, and held that the measure of the compensation was the price paid in

1911 and not the market value of the fields on the date of eviction in 1924. The lower Court refused Zingraji's claim for compensation for clearing the land, building a well, erecting an embankment and planting fruit trees. It awarded a decree for Rs. 1,425 only, which was the price paid by Zingraji in 1911.

Only two points are raised in appeal, one relating to the measure of the value of compensation and the other relating to the claim for improvements. Zingraji still claims that he is entitled to the market value of the fields on the date of his eviction, and to the money he spent on improving the fields. It is convenient to consider these two points quite separately, and, in the first instance, to discuss the measure of compensation on the assumption that no improvements had been made.

The appellant relies upon the authority of *Nagardas Saubhagyadas* v. *Ahmedkhan* (1) which the lower Court has refused to accept in face of the ruling of the local High Court in *Mohammad Razzak* v. *Amrutrao* (2). The former case lays down the definite authority that "a purchaser evicted from his holding is entitled to recover from a vendor who has guaranteed his title the value of the land at the date of eviction." The latter case enunciates the more conservative proposition that "in a claim for damages by a purchaser of land on account of eviction therefrom the damages must be determined according to what may be deemed to have been the intention of the contract between the parties to the sale." The circumstances in this latter case are similar to the circumstances in the present appeal, and the lower Court acted rightly in following the local authority. In this Court, however, the general principles underlying this obscure point have been fully discussed and I am asked to follow the definite rule of law stated in *Nagardas Saubhagyadas* v. *Ahmedkhan* (1).

That judgment discussed both the English and the American Law on the subject and points out, with reference to s. 73 of the Contract Act, that "the Legislature has not prescribed a different measure of damages in the case of contracts dealing with land from that laid down in the case of contracts relating to commodities." It accepts the English rule on the point and applies the principle contained in s. 73 of the Contract Act; and decides "that the measure of damages is the value of the land at the date of eviction." With all respect, I think that this principle cannot be accepted as a hard and fast rule applicable to Indian conditions.

In the first place, the analogy of s. 73 of the Contract Act is not a close one. In cases like the present there has been no breach of contract. There is probably no man more desirous that the contract should stand than Nagosa himself. Again, s. 73 relates to ordinary business contracts of which the sale of goods and the hire of transport are typical; all the illustrations except two fall within these two descriptions. In such transactions the periods of time contemplated by the parties are short and the variation in price of the goods sold or damages otherwise caused vary within known and fairly obvious limits. Each side to the contract has a very clear idea of the liabilities it is undertaking, but, as shown in the next paragraph of this judgment, where land is sold in India the period of an indemnity given by the vendor to the purchaser may last for many decades, and in the interval the price of land may have varied to an extent beyond the imagination of the parties to the contract. This is particularly true in Berar where the rise in the values of land since 1911 has been phenomenal. Again, s. 73 itself makes an exception in the case of "remote and indirect loss sustained by reason of the breach." It is reasonable to argue that the rise in price of land between 1911 and 1924 is an indirect result which was not in the minds of the parties in 1911. On the whole the analogy of s. 73 does not appear to be very strong.

In the second place, the adoption of a principle of English Law in such cases should only be made with extreme caution. It is possible that in England the indemnity given to a purchaser of land may subsist for long intervals, but it is likely that such cases will not arise so frequently as they do in India. Two leading examples will be sufficient to illustrate this. Alienations by the manager of a Hindu family may be challenged by his minor sons when they attain majority, and in these cases the period of the indemnity may be anything up to eighteen years Again, a Hindu widow taking her husband's estate under the Hindu Law obtains a full estate, subject

(1) 21 B. 175; 11 Ind. Dec. (N. S.) 118.
(2) 76 Ind. Cas. 451; 20 N. L. R. 55; A. I R. 1924 Nag. 257.

only to certain limitations, of which the chief is that her alienations will not extend beyond her own lifetime and may be set aside on her death by her reversioners. Considering the early age of marriage in India it is possible in many cases that the period elapsing from the date of an alienation by a widow to her death may extend to half a century or more. In view of these peculiarities of the Hindu Law it will be safer to accept English precedents only when all the circumstances furnish an exact parallel, and to avoid any hard and fast rule based on English practice.

This is what has been done by my brother Kotval in *Mohammad Razzak* v. *Amrutrao* (2). He has accepted neither the English rule nor the American rule but has stated the sound principle that the circumstances of each contract must be examined and the intention of the parties determined.

If the circumstances of the present case are stated and the above broad rule applied, the following result is obtained. Dhansa's widow sold certain fields to Nagosa in 1908. Nagosa sold the fields to Zingraji in 1911, disclosing in the sale-deed that he had bought the fields from a widow, but giving Zingraji an indemnity in case his title should be disturbed. Dhansa's reversioners evicted Zingraji in 1923. In the meantime the value of the land had appreciated very considerably. These circumstances show that Nagosa and Zingraji were aware of the defective nature of the title when they entered into the contract of sale in 1911 and it would be unfair to saddle Nagosa now with the payment of compensation based on a high value of the land which neither of the parties could possibly contemplate in 1911. I hold with the lower Court that Zingraji is entitled to the return of his purchase money.

It may seem unfair to Zingraji that he should now lose the fields which he values at Rs. 3,500 and should receive as compensation only Rs. 1,425; but it must be remembered that Zingraji knew from the outset that his title was defective, and that he has held these lands throughout the period of their appreciation on a rent which is the equivalent only of the interest on his outlay of Rs. 1,425. The other side of the question must also be considered. Nagosa disclosed his defective title in 1911 and there is no express provision in the sale-deed whereby he guaranteed to Zingraji the future value of the fields, no matter how high their price might rise.

Coming now to the question of improvements Zingraji may be entitled to recover the money he has spent on these fields while he was in possession of them under what was a perfectly legal title up to 1924, if he can show that he acted in good faith under the genuine belief that his title was good; but it does not seem to be equitable to saddle Nagosa with this additional burden. It cannot be said that his indemnity guaranteed to Zingraji compensation for fruit trees, wells, embankments and other expensive improvements which Zingraji might choose to make. For this particular loss on the part of Zingraji there is a special remedy provided for him in s. 51 of the Transfer of Property Act. The persons who are benefited by these improvements are the reversioners of Dhansa who have taken possession of the fields, and s. 51 gives Zingraji the right to claim from them the value of his improvements if he can establish that he acted in good faith under the genuine belief that his title was good. If, however, he made these improvements knowing that he might be dispossessed by Dhansa's reversioners, then the risk may fairly be held to be his own.

The appeal fails and is dismissed with costs.

G. R. D.
A. N. A. *Appeal dismissed.*

RANGOON HIGH COURT.
FULL BENCH.

CIVIL REFERENCE No. 12 OF 1926.
September 3, 1925.
Present:—Sir Guy Rutledge, KT., Chief Justice, Mr. Justice Duckworth and Mr. Justice Maung Ba.
In re THE RANGOON GYMKHANA CLUB—

Stamp Act (II of 1899), s. 4 (1), Art. 27—'Debenture', meaning of—Trust deed for securing debenture stock, nature of—Debenture certificate, proper stamp leviable on.

In order to secure payment of the debenture stock a Club 'conveyed, assigned and transferred' to the debenture trustees all the property of the Club to hold the same according to the rights and interests therein respectively of the members of the Club. Certificates of debenture stock were issued to the subscribers which stated the names of the stock-holders and the amount of stock held by them, and referred to the fact that the stock was constituted and secured by the trust deed:

Held, (1) that the certificates were not 'debentures'

within the meaning of Art. 27 of the Stamp Act; but were instruments employed for completing the trust deed under which the assets of the Club were mortgaged as security for the debenture stock, and that, therefore, they were liable to be stamped not as debentures under Art. 27, but with a duty of Re. 1 under s. 4 (1) of the Stamp Act. [p. 317, col. 2; p. 318, col. 1.]

A debenture is a document which either creates a debt or acknowledges it. [p. 317, col. 2.]

On the subject of debentures Indian Legislation follows very closely English precedents and English decisions are, therefore, of great value in determining questions relating to them. [p. 317, col. 1.]

Mr. *McDonnell*, for the Club.

Mr. *A. Eggar* (Government Advocate), for the Crown.

JUDGMENT.—This is a reference by the Financial Commissioner as to whether the form of certificate of the registered debenture stock of the Rangoon Gymkhana Club, filed on page 4 of his proceedings No. 68 of 1926-27 is chargeable with duty under the Indian Stamp Act. The reference is made under s. 57 (1) of that Act.

The certificate in question starts with a certificate number and the amount for which the certificate is issued. It then proceeds:

RANGOON GYMKHANA CLUB.

Certificate of Registered Debenture Stock.

Rs. 7,50,000, Debenture Stock, authorised to be issued, as and when needed, by a resolution at a Special General Meeting of the Members of the Club held on the 16th day of December, 1924, bearing interest at the rate of eight per cent. per annum payable every first day of March and first day of September.

THIS IS TO CERTIFY that of is the registered holder of Rs. of the above stock. The stock is constituted and secured by a trust deed dated the day of and made between John Richard Donovan Glascott, President and Basil Stephenson a Member of the Committee of the Club of the first part and Thomas Francis Robert McDonnell and Phillip Henstock, Trustees of the Club duly appointed and confirmed under r. 49 of the Rules of the Club of the second part and Gillbert Bowker Hall and Thomas Cormack as Trustees for the Stockholders of the third part and is issued subject to the provisions contained in the said deed.

For the Club it is argued that this certificate contains no promise to pay; no charge upon the assets of the Club; is not negotiable but is transferable and consequently marketable; that it does not contain any acknowledgment of indebtedness and, consequently, cannot be a debenture within the meaning of Art. 27 of Sch. I of the Indian Stamp Act.

Article 27 says: "Debenture (whether a mortgage debenture or not), being a marketable security transferable by endorsement or by a separate instrument of transfer—The same duty as a Bond for the same amount." Then there is an exemption: "A debenture issued by an incorporated Company or other body corporate in terms of a registered mortgage-deed, duly stamped in respect of the full amount of debentures to be issued thereunder, whereby the Company or body borrowing makes over, in whole or in part, their property to trustees for the benefit of the debenture-holders; provided that the debentures so issued are expressed to be issued in terms of the said mortgage-deed."

It was not contended on behalf of the Club that this exemption applies, because the Club is not an incorporated Company nor is it a body corporate. Before, however, we can hold that Art. 27 applies, we must be satisfied that the certificate before us is a debenture. We have been referred to the form of debenture given on page 42 of the 3rd Volume of Palmer's Company Precedents, 12th Edition. The learned author remarks: "Such a certificate is not the stockholder's title, it only constitutes the *indicia* of it—a solemn affirmation, to use Lord Cairns' language, under the seal of the Company that a certain amount of stock stands in the name of the individual mentioned in the certificate."

Reference was made to the case of *In re Dunderland Iron Ore Company, Limited* (1), where the certificate has many features in common with the one before us and where there was a trust-deed for securing the debenture stock made between the Company and the trustees for the stock-holders. Certain of the stock-holders petitioned the Court for a compulsory order to wind up the Company as interest which had accrued was still unpaid. Mr. Justice Swinfen Eady (a very great authority) held that the debenture stock-holders were not creditors. "There is no covenant by the Company with them. The covenant in the trust deed is between the Company and the trustees. There is no covenant in the stock certificate, and there is no statement therein beyond a copy of the conditions contained in Sch. I of the trust deed. In my opinion the true legal position is that the debenture stock-holders, although *cestuis que trust*, are not creditors of the Company. They have not any direct contract with the Company. The contract

(1) (1909) 1 Ch. 446; 78 L. J. Ch. 237; 100 L. T. 224; 16 Manson 67.

is between the Company and the trustees, and, in these circumstances, I am of opinion that the petitioners are not creditors entitled to present a winding-up petition. It is not a case in which there is any negotiable security or any coupons issued. The petitioners are merely the registered holders of debenture stock, and the only covenant to pay the principal and interest to the stock-holders is a covenant made between the Company and the trustees."

It has been urged that English cases are not a safe guide to apply to issues controlled by the words of Indian Legislation. On a subject such as debentures, however, we must note that Indian Legislation follows very closely English precedents, and, accordingly, we are of opinion that English decisions are of great value in determining such questions. The words of the learned Judge just quoted, in our opinion, apply to the case before us.

A case has been referred to and relied upon by the Financial Commissioner, *Lemon* v. *Austin Friars Investment Trust, Limited* (2). In that case, however, the certificate differed essentially from the one before us in that there was a clear acknowledgment of the debt and also a charge on the assets of the Company. Lord Justice Sargant, on page 19*, says: "The certificate begins by saying 'This is to certify that the above-named Company is indebted to' certain persons 'or to the other holders' and then follow the words 'payable only out of profits as hereinafter mentioned.' I should find it difficult to frame clearer words for the purpose of expressing that there is an immediate debt, but that that debt is only to be payable in the future, and on a contingency." And then at page 21*, "I think I should say there are these further *indicia* of its being a debenture, that it does, in my judgment, contain a charge on property, even if it is only a charge on the profits of the Company to arise while the Company is going on."

The certificate in that case was evidently of a peculiar and unusual form and the decision, in our opinion, in no way affects the decision already quoted in the *Dunderland Iron Ore Company's* case (1).

The Indian Companies Act, s. 2 (*iv*), contains the following: "Debenture includes debenture stock." This provision is taken from the English Companies Act, s. 285, and in no way helps us in construing the certificate. The same may be said of ss. 115, 125, 126 and 127. The same applies to the reference to debentures in s. 17 (2) (*iii*) of the Indian Registration Act. Debenture is nowhere defined by the Legislature and we cannot find a wider or simpler definition than that of Chitty, J., in *Levy* v. *Abercorris Slate Co.* (3): "In my opinion a debenture means a document which either creates a debt or acknowledges it, and any document which fulfils either of these conditions is a 'debenture.'"

In our opinion the certificate before us neither creates a debt nor does it acknowledge it. In these circumstances, we are of opinion that it is not a debenture within the meaning of Art. 27 of the Indian Stamp Act.

The trust-deed in this case in cl. 2 states: "In order more effectually to secure payment to the stock-holders of the amounts due to them respectively the Committee as such duly authorised Agents as aforesaid and the Club Trustees for all the estate and interest therein respectively vested in the Committee, and the Club Trustees do hereby convey, assign and transfer unto the Debenture Trustees All and Singular the Club property To Hold the same unto the Debenture Trustees according to the rights and interests therein respectively of the Members of the Club or of the Trustees upon behalf of the Members of the Club upon the trusts and for the intents and purposes hereinafter more particularly set forth."

We are consequently of opinion that the trust-deed is a mortgage whereby the Club mortgages its assets as security for the repayment of the debenture stock. Section 4 (1) of the Stamp Act states: "Where, in the case of any sale, mortgage or settlement, several instruments are employed for completing the transaction, the principal instrument only shall be chargeable with the duty prescribed in Sch. I, for the conveyance, mortgage or settlement, and each of the other instruments shall be chargeable with a duty of one rupee instead of the duty (if any) prescribed for it in that Schedule."

The trust-deed has paid full duty. The only question now for determination is: Can the certificate be considered an instrument employed for completing the trans-

(2) (1926) 1 Ch. 1; 95 L. J. Ch. 97.

*Pages of (1926) 1 Ch.—[*Ed.*]

(3) (1887) 37 Ch. D. 260 p. 264; 57 L. J. Ch. 202; 58 L. T. 218; 36 W. R. 411.

action? It is a certificate stating that a certain amount of the registered debenture stock stands in a given person's name and that this debenture stock is constituted and secured by trust-deed. Admittedly this certificate renders the amount of debenture stock standing in a given person's name marketable and transferable. That being so, we are of opinion that the certificate is an instrument employed for completing the transaction within the meaning of s. 4 of the Indian Stamp Act. We consequently answer the Reference in the affirmative and state that the certificate in question is chargeable with duty, not as a debenture under Art. 27, but as an instrument employed for completing the transaction in the case of a mortgage and is chargeable with duty of one rupee under s. 4 (1) of the Indian Stamp Act.

Reference answered accordingly.

A. N. A.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 966 OF 1922.

November 2, 1926.

Present:—Mr. Justice Broadway and Mr. Justice Zafar Ali.

THE FIRM BHOLA RAM, HARBANS LAL AND RAGHU RAI, MINORS, SONS AND LEGAL REPRESENTATIVES OF JAI RAM, DECEASED, THROUGH *Musammat* LACHHMI DEVI—DEFENDANTS—APPELLANTS

versus

BHAGAT RAM AND OTHERS—PLAINTIFFS—RESPONDENTS.

Contract Act (IX of 1872), ss. 10, 11, 25 (2)—Minor's contracts, validity of—Ratification on attaining majority, effect of—Minor, whether can enforce contract.

A minor's agreement is void and as such is incapable of being revived or ratified by him on attaining majority. But he can enforce a contract made in his favour for valuable consideration. [p. 319, cols. 1 & 2; p. 320, col. 1.]

[Case-law discussed.]

First appeal from a decree of the Senior Subordinate Judge, Rawalpindi, dated the 14th January, 1922.

Pandit *Sheo Narain*, R. B., and Lala *Badri Das*, R. B., for the Appellants.

Messrs. *Shamair Chand* and *Dev Raj Sawhney*, for the Respondents.

JUDGMENT.—This first appeal arises out of an action to recover Rs. 9,324-12-9 The plaintiffs who figure as respondents in this Court are the two brothers Bhagat Ram and Jagat Ram of whom the latter is a minor. Their father Mast Ram who kept a shop and carried on business in Rawalpindi in the name and style of Mast Ram-Bhagat Ram died in December 1914, and after his death Bhagat Ram the elder of his two sons who, too, was then a minor, stepped into his shoes and continued his business under the old name and style. His dealings with the defendants who are also shopkeepers of Rawalpindi commenced in about June, 1916, and his case was that the monies paid and the value of goods supplied by him to the defendants aggregated Rs. 20,022-11-4, that the defendants re-paid Rs. 11,024 5-3, and that they owed him the balance Rs. 8,818-6 plus Rs. 506-6-7 interest = Rs 9,324-12 7 in all. The defendants' reply was that on the account sued on they owed to the plaintiffs Rs. 8,179 0-9 but that the plaintiffs had four other separate accounts with them and owed them thereon Rs. 10,153-14-3. Deducting from this amount the sum due by them on the first account they made a counter-claim for the balance Rs. 1,728-7 plus Rs. 37-13 interest and paid the necessary Court-fee thereon. Bhagat Ram pleaded minority with regard to the said four accounts and on that ground denied his liability in respect thereof. He further asserted that one Sant Ram who was once a servant of his father but had after his death taken up service with the defendants had inveigled him to deal with them and that it was Sant Ram who had induced him to shift his place of business to a shop near that of the defendants in order to be within easy reach of them. This, however, was not established, and as regards his plea of minority the defendants' answer was that he was of age from the very commencement of his dealings with them and that even if he was not, he was estopped from setting up minority because he had led them to believe that he was a major. The Court below came to the conclusion :—

(1) that Bhagat Ram plaintiff was born on the 13th October 1899 and was consequently a minor when he began to deal with the defendants and opened three out of the four subsequent accounts but that he said or did nothing to make the defendants believe that he was a major ;

(2) that on the original account sued on the defendants owed to the plaintiffs

Rs. 8,179-0-9(which was the amount that had been acknowledged by the former as due by them on that account);

(3) that Bhagat Ram plaintiff had attained majority before the commencement of the last account and that Rs. 106-5 was due to the defendants thereon ; and

(4) that Bhagat Ram was a minor when the rest of the four accounts were opened, and so could not be held liable thereon.

In accordance with the above findings a decree for Rs. 8,072-11-9 was granted by the plaintiffs against the defendants.

The defendants have appealed against this decree and also against the order disallowing their counter-claim. Their learned Counsel frankly confessed that he could not successfully contest the finding of the Court below that Bhagat Ram was born on the 13th October 1899. That finding is based on documentary evidence which could not be impeached. But the learned Counsel contended that the said plaintiff had after attaining majority ratified all the earlier transactions and was responsible therefor ; (2) that he was estopped by his conduct from pleading minority and (3) that if the dealings between the parties were void because of the minority of the plaintiffs, no liability in respect thereof could fall on the defendants and the plaintiffs were, therefore, not entitled to recover anything from them even on the account on which the suit was based.

We will consider these contentions one by one but it may be stated here that there is no direct evidence on the record in support of the pleas of ratification and estoppel and that ratification was not even alleged in the Court below.

With regard to the question whether ratification or estoppel can be successfully pleaded against a quondam minor there is a hopeless conflict of judicial opinion in India, but the rulings relied upon by the appellants' Counsel related to cases where the quondam minor had given a bond or a promissory note for the debts contracted during his minority. In the present case there is no evidence, documentary or oral, to establish either ratification or estoppel and this being so it does not seem necessary to discuss here at great length the applicability of the principles of ratification and estoppel to quondam minors. It is now settled law that a minor's agreement s void, and what is void is obviously a nullity and has no existence in the eye of law. It would, therefore, be a contradiction in terms to say that a void contract can be ratified. But in the Calcutta case *Kundan Bibi* v. *Sree Narayan* (1) a bond was executed by *S* after attaining majority promising to pay within a year Rs. 7,000 being the price of piece-goods sold to him during his minority and also to re-pay Rs. 76 advanced to him for necessaries. The obligee sued *S* on the bond and it was held by Mr. Justice Harington who tried the case on the Original Side that *S* was liable. This ruling was considered by a Division Bench of the Calcutta High Court in *Narendra Lal Khan* v. *Hrishikesh Mukerjee* (2) and was dissented from. The learned Judges cited with approval the following comment of Pollock and Mulla on Mr. Justice Harington's decision : "We fail to see how either the forbearance to sue or the advance for necessaries could be regarded as a new consideration, and we are of opinion that the decree so far as it awarded to the plaintiff the price of the goods sold was erroneous in law." But more recently in *Ram Rattan* v. *Basant Rai* (3) *Kundan Bibi* v. *Sree Narayan* (1) was followed by a Division Bench of our own High Court (Abdul Raoof and Moti Sagar, JJ.) and they also cited with approval the ruling of the Punjab Chief Court in *Karm Chand* v. *Basant Kaur* (4) where it was held that s. 25 (2) of the Indian Contract Act was intended to give effect to minors' agreements which would otherwise be void as being without consideration. But the comment of Pollock and Mulla on *Karm Chand* v. *Basant Kaur* (4) is that it is not sound law. *Narendra Lal Khan* v. *Hrishikesh Mukerjee* (2) was not brought to the notice of the Judges responsible for *Ram Rattan* v. *Basant Rai* (3) and the comment of Pollock and Mulla on *Karm Chand* v. *Basant Kaur* (4) was also not referred to. Further *Indran Ramaswami Pandia Thalavar* v. *Anthappa Chettiar* (5) and *Krishnan Chetty* v. *Vellaichami Thevan* (6) were not referred to. In the former it was held that "a promissory note given by a person on attaining majority in settle-

(1) 11 C. W. N. 135.
(2) 46 Ind. Cas. 765.
(3) 64 Ind. Cas. 121; 2 L. 263; 3 L. L. J. 563.
(4) 11 Ind. Cas. 321; 31 P. R. 1911; 192 P. L. R. 1911; 236 P. W. R. 1911.
(5) 16 M. L. J. 422.
(6) 12 Ind. Cas. 568; 37 M. 38; 10 M. L. T. 385; (1911) 2 M. W. N. 461; 21 M. L. J. 1077

ment of an earlier one signed by him while a minor in consideration of money then received from the obligee cannot be enforced in law and that such a note is void for want of consideration." Similarly in *Krishnan Chetty* v. *Vellaichami Thevan* (6) it was held that "there can be no ratification of a transaction which is void owing to the promisor possessing no contractual capacity at the time. Nor can a void deed form a good consideration for a fresh contract made by the minor on attaining majority." These rulings appear to us to be in accord with the general principle that a void contract which is a dead letter and entails no liability cannot be revived and cannot constitute a valid consideration for a subsequent contract. We, therefore, are of opinion that the plaintiffs in the present case incurred no liabilities in respect of the transactions entered into with them, during their minority, and that those transactions could not be ratified.

The conflicting rulings on the question of estoppel are referred to in *Wasinda Ram* v. *Sita Ram* (7) where it was held after review thereof that s. 115 of the Evidence Act was applicable to minors also. We need not consider these authorities here because there is no evidence on the record in support of the plea of estoppel.

The third contention of the appellants' learned Counsel is also untenable. There is no conflict of opinion with regard to the competency of a minor to enforce a contract made in his favour for a valuable consideration and it has been held that "though a sale or mortgage of his property by a minor is void [*Mohori Bibee* v. *Dharmodas Ghose* (8)] a duly executed transfer by way of sale or mortgage in favour of a minor who has paid the consideration money is not void and it is enforceable by him or by any other person on his behalf": [see *Ulfat Rai* v. *Gouri Shanker* (9), *Munni Koer* v. *Madan Gopal* (10), *Narain Das* v. *Dhanaia* (11), *Meghan Dube* v. *Pran Singh* (12), *Munia Konan* v. *Perumal Konan* (13), *Raghava Chariar* v. *Srinivasa Raghava Chariar* (14) and *Madhab Koeri* v. *Baikuntha Karmaker* (15).] It is a matter of common knowledge that a minor can make purchases in the *bazar* and no trader after receiving money from him can refuse to deliver the goods purchased or to return the money. In *Raghava Chariar* v. *Srinivasa Raghava Chariar* (14) a Full Bench of the Madras High Court held that a mortgage executed in favour of a minor who has advanced the mortgage-money is enforceable by him or by any other person on his behalf. It has also been held that a promissory note executed in favour of a minor is not void and can be sued upon by him [*vide Rungarazu Sathrurazu* v. *Maddura Basappa* (16)]. The principle underlying is that while no liability can be incurred by a minor, he is not debarred from acquiring a title to anything valuable. In the present case, therefore, the defendants are liable to re-pay or account for the monies and goods that they received from Bhagat Ram plaintiff. According to their own showing they owe to plaintiffs Rs. 8,179-0-9 in respect of advances received from them. As regards the other accounts which were started when Bhagat Ram was a minor, he did not incur any liability for any of the dealings which took place before he had attained majority but he is decidedly liable to be called to account for all the transactions that he entered into afterwards. The argument of the plaintiffs' Counsel that all the different transactions of any one of the accounts should be taken as a whole as one transaction is obviously unsound.

The result is that we accept the appeal and remand the case to the Court below for deciding what amount, if any, is payable by the plaintiffs in respect of the transactions of the three accounts (*a*, *b* and *d*) during the periods from the 13th October, 1917, onwards for which they were continued. The amount, if any, so found, should be deducted from the sum that has already been found due to them by the defendants and a decree should be passed in their favour for the balance. Parties will bear their own costs in this Court. In the Court below the plaintiffs shall get costs in proportion to the amount that will be decreed to them.

R. L. *Case remanded.*

(7) 59 Ind. Cas. 393; 1 L. 389; 51 P. W. R. 1920.
(8) 30 C. 539; 7 C. W. N. 441; 5 Bom. L. R. 421; 30 I. A. 114; 8 Sar. P. C. J. 374 (P. C.).
(9) 11 Ind. Cas. 20; 33 A. 657; 8 A. L. J. 670.
(10) 31 Ind. Cas. 792; 38 A. 62; 13 A. L. J. 1084.
(11) 35 Ind. Cas. 23; 38 A. 154; 14 A. L. J. 65.
(12) 30 A. 63; 5 A. L. J. 14; A. W. N. (1908) 10.
(13) 26 Ind. Cas. 195; 37 M. 390.
(14) 36 Ind. Cas. 921; 40 M. 308; 31 M. L. J. 575; 20 M. L. T. 407; (1916) 2 M. W. N. 363 (F. B.).
(15) 52 Ind. Cas. 338; 5 P. L. J. 682; (1919) Pat. 343.
(16) 18 Ind. Cas. 968; 24 M. L. J. 363; 13 M. L. T. 325; (1913) M. W. N. 415.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 578 OF 1925.
(CRIMINAL REVISION PETITION No. 487 OF 1925.)
March 11, 1926

Present:—Mr. Justice Wallace.

P. VARADARAJALU NAYUDU—COMPLAINANT—PETITIONER

versus

P. KUPPUSAMI NAYUDU—ACCUSED—RESPONDENT.

Cr. P. C. (Act V of 1898), ss. 202, 203—Proceedings under s. 202—Notice to accused before hearing complainant's case, legality of.

An accused person is not to be called upon under s. 202, Cr. P. C., to appear unless and until the Magistrate has satisfied himself from the complainant and his witnesses that there is a *prima facie* case against him. [p. 321, col. 2.]

It is highly irregular for a Magistrate when a complaint is put in and sworn to, without hearing the complainant's case or his witnesses, to issue notice to the accused to appear and show cause against the issue of process, hear what the accused has to say, examine any witnesses he wishes to have examined and then decide whether the complaint shall be received or not. [p 332, col. 1.]

Sheik Meeran Saib v. *Ratnavelu Mudaly* (1), followed.

In the matter of the petition of Dukhi Kewat (6) and *In re Tukaram Udaram* (7), dissented from.

Petition, under ss. 435 and 439 of the Cr. P. C., 1898, praying the High Court to revise an order of the Third Presidency Magistrate, George Town, Madras, dated 4th May, 1925, in Application No. 3172 of 1925.

Mr. *V. L. Ethiraj*, for the Petitioner.

Mr. *K. P. Krishna Menon*, for the Crown.

Mr. *O. Thanikachalam Chetty*, for the Accused.

ORDER.—This is a criminal revision case against the order of the Presidency Magistrate dismissing a complaint under s. 203, Cr. P. C. The chief ground of attack is that the Magistrate has ignored the proper procedure under ss. 202 and 203 and adopted a procedure for which there is no warrant and which is in many ways open to objection.

It appears that the procedure is one which has been for many years in practice in that Court. It is that when a complaint is put in and sworn to, the Magistrate without hearing the complainant's case or his witnesses issues notice to the accused to appear and show cause against the issue of process, hears what the accused has to say, examines any witnesses he wishes to have examined and then decides whether the complaint shall be received or not.

It is argued that this procedure is justified by s. 202. It may be said that it is not prohibited by the letter of that section but it is clearly contrary to the spirit of that section and to the general principles of the Code. Section 202 clearly implies that an accused is not to be troubled unless the Magistrate is first satisfied that the complaint is *prima facie* true, and, therefore, a case is made out which the accused must rebut. To call upon an accused to appear and disclose his defence before the Magistrate has satisfied himself that the complaint is *prima facie* true is contrary to the spirit of the whole procedure of criminal trials. It is no justification to say that the accused is willing to adopt that procedure because if he refused to adopt it he will do so at his peril and the Magistrate would at once conclude that there was a good case against him. It is a procedure most unfair to the accused. He is in effect compelled not only to state, but to substantiate his defence, before the prosecution has substantiated any case against him, and this is the exact opposite of the principle underlying the prescribed procedure. It is not until the prosecution case has been fully and thoroughly put forward and tested by cross-examination that the accused is to be called upon to put forward his defence. Under the procedure now adopted if the Magistrate rejects the defence and considers that there is a case to go on with, then the accused has to put his case forward before a Magistrate who has already rejected his defence. From this point of view alone the procedure is indefensible.

It is no less unfair to the prosecution. The result, I suppose in a majority of cases is that the complaints are thrown out without the complainant having been allowed to put forward his full case at all. The Magistrate accepts the defence before he knows what the full prosecution is.

The meaning of s. 202 is perfectly clear. It is that the accused is not to be called upon to appear unless and until the Magistrate has satisfied himself from the complainant and his witnesses that there is a *prima facie* case against him.

This procedure has been condemned by this Court so far back as 1912 in *Sheik Meeran Saib* v. *Ratnavelu Mudaly* (1) where Bakewell, J., remarks:

"It appears to me that the object of the procedure prescribed by Ch. XVI, which is entitled of complaints to Magistrates, is

(1) 21 Ind. Cas. 703; 37 M. 181; 25 M. L. J. 1.

the separation of unfounded from substantial cases at the outset, and to prevent innocent persons from being brought into the Police Courts and subjected to the annoyance of frivolous charges."

See also Cr. R. C. No. 123 of 1925, which is also a case from the Presidency Magistrate's Court.

Such a practice has frequently been condemned by the Calcutta High Court. See *Baidya Nath Singh* v. *Muspratt* (2), *Bhim Lal Sah* v. *Bisa Singh* (3), *Bolai Lall* v. *Pashupati Chatterjee* (4), *Chandi Charan Mitra* v. *Manindra Chandra Roy* (5) and *Bachoo Mia* v. *Anwar Nabi* (6). I note that the decision in *Baidya Nath Singh* v. *Muspratt* (2) has been dissented from by a Single Judge in *In the matter of petition of Dukhi Kewat* (7). This latter case and *In re Tukaram Udaram* (8), are the only cases that the respondent has been able to put before me in his favour. In *In re Tukaram Udaram* (7) the point was whether the issue of process to the accused for the purpose of enquiry under s. 202 meant that the trial had begun and the propriety of the issue of that process was not discussed.

The ruling of this Court in *Sheik Meeran Saib* v. *Ratnavelu Mudaly* (1) so far back as 1912, referring to the procedure in the presidency Magistrate's Court, does not seem to have had any effect in putting a stop to this practice. It is time, therefore, that this undesirable practice should cease and it will not cease until the Magistrates are in each case compelled to do over again what they have done improperly.

I am of opinion that the complainant has not had a fair hearing of his case, that he is entitled under s. 202 to have that case reconsidered and I remand the case for that purpose. I reverse the Magistrate's order and direct him to re-hear the complaint. It is hardly necessary to add that the statement of the accused and his witnesses which have been now taken cannot be treated as evidence at the re-hearing.

V. N. V. *Order set aside.*

(2) 14 C. 141; 11 Ind. Jur. 226; 7 Ind. Dec (N. S.) 93.
(3) 18 Ind. Cas. 345; 40 C. 444; 17 C. W. N. 290; 14 Cr. L. J. 57.
(4) 35 Ind. Cas. 828; 21 C. W. N. 127; 17 Cr. L. J. 396; 25 C. L. J. 606.
(5) 72 Ind. Cas. 173; 27 C. W. N. 196; 36 C. L. J. 414; A. I. R. 1923 Cal. 198; 24 Cr. L. J. 333.
(6) 84 Ind. Cas. 449; 30 C. W. N. 312; 26 Cr. L. J. 405; A. I. R. 1925 Cal. 576.
(7) 28 A. 421; 3 A. L. J. 224; A. W. N. (1906) 76; 3 Cr. L. J. 327.
(8) 6 Bom. L. R. 91; 1 Cr. L. J. 102.

LAHORE HIGH COURT.

CRIMINAL APPEAL No 141 OF 1926.

May 13, 1926.

Present:—Mr. Justice Broadway and Mr. Justice Zafar Ali.

MUZAFFAR—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Evidence Act (I of 1872), s. 32—Dying declaration, value of.

A dying declaration made at a time when the person making the same was well aware of the fact that the accused had been named as the actual assailant does not carry any weight.

Appeal from an order of the Sessions Judge, Sargodha, dated the 21st January, 1926.

Mr. *M. L. Puri*, for the Appellant.

Mr. *Des Raj Sawhney*, Public Prosecutor, for the Respondent.

JUDGMENT.

Broadway, J.—Muzaffar, son of Nur Khan, has been convicted of having caused the death of Alam Khan and under s. 302, Indian Penal Code, has been sentenced to death. He has preferred an appeal and the case is also before this Court under s. 374, Cr. P. C., for order as to the confirmation or otherwise of the death sentence

The facts are simple and have been detailed in the judgment of the learned Sessions Judge. At 9 A. M. on the 21st August, 1925, *Musammat* Alo, wife of Alam Khan, reported at the Police Station, Mitha Tiwana, to the following effect. She said that she and her husband had been sleeping on the previous night on separate *charpais* in her *dhapri* and that at about 11 P. M. Muzaffar and Saadullah, sons of Nur Khan, had come into the *dhapri* and that Muzaffar had struck Alam Khan a blow with a hatchet. She went on to say that she went to the assistance of her husband and had been pushed away by Muzaffar after which both the culprits had made off. On her cries Ghulam Muhammad, Walia, Solatha and others reached the spot. She had then reported the matter to Buti *chaukidar* and had gone with him to *Malik* Sikandar Khan, *Zaildar* of Hadaili, early in the morning and told him what had occurred. He sent her with the *chaukidar* to the Police Station and his *sarbarah* to the spot. It will be seen from this report that *Musammat* Alo claimed to be an eye-witness. The Police went to the village and there made the usual enquiry. Walia, son

of Ali, and Ghulam Muhammad, son of Muhammad, were examined by the Police, the former claimed to have been aroused on by hearing *Musammat* Alo's cries, whereupon he had rushed to the spot and seen the two persons named running away. He had pursued them, but on being threatened, returned. Ghulam Muhammad professed to reach the spot, just as Walia, had returned from the pursuit. The deceased Alam Khan also is recorded as having told the Police that Muzaffar and Saadullah, sons of Nur Khan were his assailants, Muzaffar striking him a blow with a hatchet. Alam Khan was sent to the hospital where he died on the 4th September, 1925. Before his death on the 29th August, 1925, Alam Khan's statement was recorded by the Naib-Tahsildar. In that statement he stated that he recognised Muzaffar son of Nur Khan and had come to know that the other man was Saadullah. At the end of the statement he stated that he identified both.

This is practically all the evidence on the record and this evidence has been considered unreliable as far as Saadullah is concerned and Saadullah has been acquitted. Of the four Assessors, three are of the opinion that the case was doubtful against both the persons. One of the Assessors gave it as his opinion that Muzaffar was guilty.

Admittedly the attack on Alam Khan was made on the night after *amawas*, that is to say, that the night of the occurrence was about the darkest in the month. It is extremely unlikely that Alam Khan could have identified his assailants It has to be borne in mind that only one blow was struck and it was that blow that probably awoke Alam Khan. The possibility of his identifying his assailants is a remote one. *Musammat* Alo said that she was awake, but to my mind it is extremely unlikely that she is correct as the probability is that she was aroused by hearing the sound of the blow given to her husband.

The learned Sessions Judge has disbelieved the evidence of Walia for very good reasons. It is perfectly evident that the story he now states is not the story that he first gave to the Police. Ghulam Muhammad is related to the deceased and doubtless he arrived on the scene soon after *Musammat* Alo had raised the hue and cry. His evidence, however, depends entirely on that of *Musammat* Alo.

No motive for the attack was given in the initial report. The motive set out at the trial is that some fortnight before this occurrence a mare belonging to Kalu, the son of the deceased, had gon astray. On the 13th August. 1925, Kalu made a report at the Police Station in which he said that he 'suspected' that the mare had been 'criminally misappropriated' by Muzaffar and Saadullah, sons of Nur Khan, and Khanan and Ghulam Muhammad. When questioned about this at the trial, Kalu stated that there was no previous enmity of any kind between the parties and that these men were named simply because "we had a belief that no one else would dare steal our mare." *Musammat* Alo has admitted that she did not know that any persons other than Muzaffar and Saadullah had been suspected of misappropriating the mare. It has been urged, I think with some force, that when *Musammat* Alo was aroused she recognised no body, and jumped to the conclusion that her husband's assailants must be the same as those concerned in the disappearance of the mare. It is significant that Buti *chaukidar* who was the first official of any kind to be told of the occurrence has not been examined. The *zaildar* to whom *Musammat* Alo reported the matter before going to the Police Station has also not appeared in the witness box.

I cannot place any reliance on the dying declaration as by the time it was made Alam Khan must have been well aware of the fact that the appellant had been named as the actual a-sailant.

Having regard to the fact that the motive for the alleged attack is very weak, that the night was a very dark one and that it was extremely unlikely that *Musammat* Alo could have identified her husband's assailants and that important witnesses have not been examined, there is considerable doubt in my mind as to the guilt of the appellant. To this doubt Muzaffar is entitled. I would, therefore, accept this appeal, set aside the conviction and sentence and direct his release.

Zafar Ali, J.—I agree.

R. L. *Appeal accepted.*

MADRAS HIGH COURT.

CRIMINAL APPEAL No. 331 OF 1926.

September 22, 1926.

Present:—Mr. Justice Wallace and Mr. Justice Madhavan Nair.

In re P. NATESA MUDALIAR—ACCUSED—APPELLANT.

Madras City Municipalities Act (IV of 1919), s. 288—'Machinery', meaning of—Permission of Commissioner, for erection of machinery, necessity for—Interpretation of Statute—Marginal note.

An electric motor-driving mill which emits disagreeable odours and produces considerable noise is 'machinery' for the erection of which permission from the Commissioner is necessary.

For the application of s. 288 of the Madras City Municipalities Act it is not necessary that the machinery must be a nuisance.

The question whether a machinery is or is not a nuisance is one for the Commissioner alone, and if he finds that it is a nuisance he may refuse permission altogether.

It is not a legitimate canon of construction to refer to the marginal note for the purpose of construing a section.

Appeal against an order of the Court of the Presidency Magistrate, George Town, Madras, in Case No. 30,903 of the Calendar for 1924.

Mr. *P. Sankaranarayana*, for the Appellant.

The Crown Prosecutor, for the Crown.

JUDGMENT.—The appellant has been convicted of erecting without the permission of the Commissioner of the Madras Municipal Corporation, machinery by the use of which smell, noise, vibration, etc., are produced. This is an offence by virtue of ss. 288 and 357 and Sch. VII of the Act. Admittedly he has put up an electric motor-driving mill and the evidence shows that this machinery emits disagreeable odours and produces considerable noise.

It is contended that this is not machinery. This contention deserves no consideration.

Next, it is urged that the appellant had only substituted this motor for an oil engine for which he had taken out permission. But even so, it is obvious that he had erected this machinery.

Finally, it is urged that the machinery is not a nuisance. But that is no defence to the case. The wording of s. 288 is plain that the question whether the machinery is or is not a nuisance is one for the Commissioner alone, and if he finds that it is a nuisance he may refuse permission altogether. Whether it is a nuisance or not a nuisance is immaterial, permission has to be obtained in either case and may be withheld in the former case.

It is, however, brought to our notice that one learned Judge of this Court has in a ruling reported in *In re, Smith* (1) taken a different view, namely, that it must be proved that the machinery is a nuisance before any part of the section comes into operation. With all deference we are unable to agree with this view. To hold so would result in this, that the section empowers the Commissioner to grant a license for what is a public nuisance and what he himself considers a public nuisance. The learned Judge was constrained to support his reading of the section by referring to the marginal note, but it has been frequently held that that is not a legitimate canon of interpretation—see the Privy Council case in *Balraj Kunwar* v. *Jagatpal Singh* (2). The section as it stands is to our minds perfectly plain; any one erecting machinery must get the permission of the Commissioner (whether permission is equivalent to license is a matter which we need not consider in this case) and the Commissioner may refuse permission if the machinery in his opinion constitutes a nuisance to the neighbourhood. The section is a very salutary one in the interests of the general public. We can, therefore, see no reason to interfere and we dismiss this appeal.

V. N. V. *Appeal dismissed.*

(1) 81 Ind. Cas. 72; 45 M. L. J. 731; 18 L. W. 879; 33 M. L. T. 185; A. I. R. 1924 Mad. 389; 25 Cr. L. J. 584.

(2) 26 A. 393 at p. 406; 8 C. W. N. 699; 1 A. L. J. 384; 7 O. C. 248; 31 I. A. 132; 8 Sar. P. C. J. 639 (P. C.)

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 817 OF 1926.

November 4, 1926.

Present:—Mr. Justice Fforde and Mr. Justice Addison.

ABDUL GHANI—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 302—Murder—Circumstances under which murder committed not clear—Conviction, legality of.

It is unsafe to convict a person of murder where the circumstances under which it has been committed are not very clear and are somewhat mysterious and the charge has not been clearly brought home to the accused. [p. 325, col. 2.]

Criminal appeal from an order of the Sessions Judge, Karnal, dated the 10th July, 1926.

Mr. *Shamair Chand*, for the Appellant.

Mr. *R. C. Soni*, for the Government Advocate, for the Respondent.

JUDGMENT.

Fforde, J.—Shakur, Bullan and Mahbub and the appellant Abdul Ghani, have been tried together for the murder of one Mubin. Shakur, Bullan and Mahbub have been acquitted and Abdul Ghani has been convicted, the four Assessors disagreeing with the learned trial Judge.

The facts are that on the 14th April, 1925, Mubin was found between 7 and 8 P. M., lying dead in a hut of grass which had been set on fire. A gun was lying between his legs. The medical evidence is that he probably died from a gun shot wound fired close to the left side of the neck in front, the shot emerging at the left parietal region. There is some discrepancy between the Crown witnesses as to whether this particular gun had actually been fired or not or even whether it was capable of being fired at all. The Sub-Inspector of Police who made the investigation was of opinion that the gun could have been fired whereas the medical witness who was not an expert qualified to give an opinion with regard to this, volunteered that, judging from the condition in which he saw it he was of opinion that it could not have been fired. It must be borne in mind, however, in considering this evidence that the gun had been lying in a hut which had been burnt by fire and which had also had water thrown over it. It seems hardly possible to state what was the condition of that weapon before it was exposed to both fire and water.

The evidence on which the appellant has been convicted consists mainly of statements made by witnesses, suggesting that his demeanour was somewhat too calm when attention was drawn to the fact that his hut of grass was burning. One of these witnesses had not made his statement to the Police until ten days after the event. In any event it seems to me that quite a disproportionate weight has been given to this class of evidence. After all, if a man sees, his hut of grass more or less in full possession of flames it is hard to understand, when it is obvious that he could do nothing to put the flames out why he should not have remained calm. It depends a good deal upon the temperament of the man but it is largely upon his demeanour as testified to by these witnesses that the learned Judge has based his conviction.

The motive alleged is that the deceased who was a servant of the appellant had had perverted intercourse with a boy Saddiq and that after some time the boy contracted the same type of intimacy with the appellant, and that thereupon the deceased retaliated by committing an unnatural offence with Akbar, the nephew of the appellant. Owing to these circumstances it is suggested that the appellant murdered Mubin. The learned trial Judge has found and after carefully examining the entire evidence we consider he has found rightly that this motive has not been established.

Mr. Shamair Chand, for the appellant, has suggested that the nature of the wounds upon the dead man, and the fact that he is proved to have quarrelled with his wife and not visited his house for several months coupled with the fact that on the morning of the *Id* celebrations he was seen going about bare-headed would suggest that he had committed suicide.

Whether he was murdered or whether he committed suicide, we are satisfied upon the evidence in this case that his death has not been legally brought home to the appellant. The learned trial Judge in sentencing the appellant to transportation for life instead of to the death penalty gives his reasons for so doing in the following terms. "As however the circumstances under which the murder was committed are not very clear and are somewhat mysterious, I do not think the case is one in which the sentence of death should be passed." In other words the learned trial Judge seems to have come to the conclusion that as the charge of murder had not been clearly brought home to the appellant it would be safer to sentence him to tansportation for life than to sentence him to be hanged. The conviction is clearly not sustainable and must be set aside.

I would, accordingly, accept the appeal, set aside the conviction and sentence and direct that the appellant be set at liberty.

There is also a revision application for enhancing the sentence. No body appears to support this application and in view of

the above conclusion this application must be rejected.

Addison, J.—I concur.

R. L. *Appeal accepted.*

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 181 OF 1926.
(CRIMINAL REVISION PETITION No. 163 OF 1926.)
July 22, 1926.

Present:—Mr. Justice Ramesam.

GOLLA PULLAMMA—COMPLAINANT—PETITIONER

versus

SANJIVI REDDI—ACCUSED—RESPONDENT.

Cr. P. C. (Act V of 1898), s. 247—Dismissal of complaint for default of complainant—Discretion of Court—Revision—Interference by High Court.

The High Court will interfere in revision with an order dismissing a complaint under s. 247 of the Cr. P. C., only in cases where it finds that the Magistrate has exercised his discretion improperly.

Petition, under ss. 435 and 439 of the Cr. P. C, 1898, praying the High Court to revise the order of the acquittal of the accused, dated 26th January, 1926, of the Second Class Magistrate, Atmakur, in C. C. No. 302 of 1926.

Mr. *B. Somayya*, for the Petitioner.

The Public Prosecutor, for the Crown.

Mr. *V. Kothandaramayya*, for the Accused.

ORDER.—This is a case in which one has the feeling that an accused who deserves to be punished for his audacious conduct has escaped by an accident. In this respect, it is similar to *In re Sinnu Goundan* (1), *Nagarambilli Tankya* v. *Matta Jagannatha* (2) and *Venkatarama Aiyar* v. *Sundaram Pillai* (3) and *Ottavu Subbiah* v. *Anukotibiah* (4)]. The first of these cases may be distinguished on the ground that it is the District Magistrate who moved the High Court and in such a case there might well be an appeal against acquittal by the Local Government. In all the other cases, the complainant sought the assistance of the High Court.

In Cr. R. C. No. 428 of 1925 [*Ottavu Subbiah* v. *Inukotibiah* (4)] the complainant's evidence was closed, his Pleader was present and the case was posted at an unusual hour and Krishnan, J., might well have held that the order under s. 247 of the Cr. P. C was not a proper order. But these cases resemble more *Venkatarama Aiyar* v. *Sundaram Pillai* (3) and *Nagarambilli Tankya* v. *Matta Jagannatha* (2). It is true that in view of the fact that there were six adjournments (none of them at the instance of the complainant) one feels some sympathy with the complainant, but still, it is difficult to say on the facts that the Magistrate exercised his discretion improperly. It is true he is not bound to wait the whole day. He might have waited for some time more.

I am not to be taken as holding that the High Court has no power to interfere with an order under s. 247 of the Cr. P. C, in revision. If the order is improper the High Court can interfere. The petition is dismissed.

V. N. V. *Petition dismissed.*
Z. K.

(1) 23 Ind. Cas. 188; 38 M. 1028; 26 M. L. J. 160; (1914) M. W. N. 273; 15 Cr L. J. 235.

(2) 93 Ind. Cas 652; 27 Cr. L. J. 988; A I. R. 1926 Mad. 1009; 49 M. 883; (1926) M. W. N. 928; 24 L. W. 669.

(3) 72 Ind. Cas 885; 17 L. W. 229; 44 M. L. J. 119; A. I R. 1923 Mad. 439; 24 Cr. L. J. 469.

(4) 98 Ind. Cas. 607; 27 Cr. L. J.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 891 OF 1926.
November 3, 1926.

Present:—Mr. Justice Fforde and Mr. Justice Addison.

ARJAN—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal trial—Motive as basis for conviction.

Motive in itself is quite inadequate to sustain a conviction unless there are other grounds upon which it could rightly be had.

Criminal appeal from an order of the Sessions Judge, Karnal, dated the 3rd August, 1926.

Mr. *Shamair Chand*, for the Appellant.

Mr. *R. C. Soni*, for the Government Advocate, for the Respondent.

JUDGMENT.

Fforde, J.—The appellant Arjan was tried with seven other persons for the murder of one Parbhu. The other seven persons have been acquitted and the appellant has been convicted and sentenced to transportation for life.

It is alleged that Arjan made a *karewa* marriage with a certain *Musammat* Jiwani who is the step-mother of the murdered youth, and the motive for the murder is said to be the desire of Arjan to get rid

of the boy in order that *Musammat* Jiwani should get possession of the whole of the land thereby giving the appellant an opportunity to benefit.

On the morning of the 27th May, 1924, the body of the deceased was found partly burnt and with a hole in the neck in which were pieces of metal. On the day that the corpse was discovered the appellant made a statement at the Police Station, the material part of which is in these words:—'I, Arjan, with Ind Raj *Lambardar* went to the spot and found him, Parbhu, dead. I up to now have no suspicion about the death, nor am I able to know how the death has come about" It is upon this statement coupled with the fact that the appellant was in a position to gain by the death of Parbhu, that the conviction against him has been mainly based. The learned Sessions Judge interpreted this statement to read as a report that Parbhu had committed suicide. A number of witnesses have been produced including an informer, but none of these witnesses have been believed by the trial Judge with the exception of one Gopala, prosecution witness No. 5. Some of these witnesses state that Arjan made a confession to a *panchayat*. This evidence has been quite rightly rejected by the trial Judge. Other witnesses say that they saw Arjan in the company of six or seven other persons conveying the body of the murdered man in a cart, and deposed to certain remarks made by Arjan. This evidence also with the one exception I have referred to, has not been accepted by the learned Sessions Judge, and in my opinion, has been rightly rejected. None of these witnesses came forward to give any information as to the death of the deceased until the 17th January, 1926, upon a second enquiry, the first enquiry having taken place immediately after the body had been discovered. Moreover, these witnesses did not come forward until a punitive Police post had been established in their village for more than a year, and it was only when the Superintendent of Police promised to remove the Police post upon condition that the murder was traced. that any evidence was procurable. Under these circumstances the learned trial Judge has quite rightly refused to accept the testimony of the nature given under the conditions under which it had been elicited with the exception, as I have already said, of the evidence of Gopala. The reason why the learned Sessions Judge relies upon Gopala is his impression that Gopala had in fact given evidence at an earlier date. This impression the learned Trial Judge gathers from a question put in cross-examination by Gopala to Arjan in a previous civil litigation in which Arjan was a witness for the other side. This question suggests that Gopala had given some evidence against Arjan before the Police in the earlier investigation of this case. No evidence is produced to show that Gopala did in fact give such evidence, the nature of the evidence is not even hinted at, and yet upon this alleged statement in a civil case not properly proved, the learned Sessions Judge has apparently come to the conclusion that Gopala had in fact given evidence of an incriminating nature against the appellant. It is quite obvious that such a presumption cannot be drawn. The result is that Gopala's evidence should have been treated in precisely the same way as that of the other witnesses whose evidence has been rightly rejected.

The only thing which remains is the fact that the appellant does stand to gain by the death of the murdered boy. But in most cases of death somebody stands to gain, and all that can be said is that there is some motive for Arjan to get rid of the boy. The motive in itself is of course quite inadequate to sustain a conviction unless there are other grounds upon which it could rightly be had.

The other ground relied upon by the trial Judge is the statement at the *thana* to which I have already referred. As I have said the learned Sessions Judge regards it as a highly incriminating document owing to the fact that he reads that statement as being a report by Arjan that the deceased had committed suicide, whereas it was perfectly obvious that he could not have killed himself in the manner in which he was obviously killed and subsequently burnt his own body. All that the appellant's statement, in my opinion, amounts to is this: that he had found the deceased's body, and that he had no suspicion as to how his death was brought about or as to who had caused it. It is of course a fact that he did not give a description of the condition of the body, which circumstance may rightly be commented upon. But in view of the fact that a *lambardar* had accompanied him to the spot when he discovered it, and in view of the

fact that the Police themselves would naturally go to the scene and see the condition the body was in, it was really unnecessary for the appellant to give a detailed description of the body and the omission to describe its condition was in no way important. The approver's evidence has been rejected for very sufficient reasons, which are set out in the learned Sessions Judge's judgment.

There remains no other evidence to base a charge of murder upon. I may point out that the Assessors were unanimous in coming to the conclusion that the case had not been proved against any of the persons on trial. For the reasons given I am of opinion that the case has not been established with that reasonable certainty which the law requires, and I would accordingly accept the appeal, set aside the conviction and sentence and direct that the appellant be discharged from custody.

Addison, J.—I concur.

R. L. *Appeal accepted.*

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 73 OF 1926.
(CRIMINAL REVISION PETITION No. 66 OF 1926)
May 6, 1926.

Present:—Mr Justice Devadoss.

CHINNAMMAL—COMPLAINANT—PETITIONER

versus

KONDA REDDI AND OTHERS—ACCUSED—RESPONDENTS.

Cr. P. C. (Act V of 1898), s. 209—Committal to Sessions—Duty of Committing Magistrate.

In all Sessions cases it is for the Sessions Judge to weigh the evidence and come to a conclusion. The committing Court has only to see whether there is evidence which, if believed, would sustain a conviction. It is not its function to consider the probabilities and the evidence in the case as if it is a trying Court.

Petition, under ss. 435 and 439 of the Cr. P. C., 1898, praying the High Court to revise the order of the Court of Session, North Arcot at Vellore, in Cr. R. P. No. 8 of 1925 (C. C. No. 137 of 1924, on the file of the Court of the Sub-Divisional Magistrate, Tiruvannamalai.)

Mr. *Ethiraj*, for the Petitioner.

Messrs. *V. N. Kuppa Rao* and *P. Viswanatha Iyer*, for the Respondents.

Mr. *F. S. Vaz*, for the Public Prosecutor, for the Crown.

ORDER.—This is an application to revise the order of discharge by the Sub-Divisional Magistrate of Tiruvannamalai. The deceased was almost beaten to death and there were as many as 30 injuries on his person. He made a statement as regards the occurrence. There is a volume of evidence in the case which if believed would sustain a conviction at least under s. 304 or 326, Indian Penal Code. The Sub-Magistrate who heard the case ought to have committed the accused to the Court of Sessions as in all Sessions cases it is for the Sessions Judge to weigh the evidence and come to a conclusion. The committing Court has only to see whether there is evidence which if believed would sustain a conviction. It is not the function of the committing Court to consider the probabilities and the evidence in the case as if it is a trying Court. A great deal of reliance is placed upon the medical evidence, but I do not want to say anything which might prejudice one side or the other. But it appears that the medical evidence is not such as should be accepted without careful investigation of the facts of the case. I think in these circumstances the order of the Magistrate discharging the accused should be set aside and the accused should be committed to the Court of Sessions. I, therefore, direct the Magistrate to restore the case to his file and commit the accused to the Court of Sessions. The trial will be held by the Sessions Judge of Chittor inasmuch as the Sessions Judge of North Arcot has dealt with the case in revision. The Magistrate will release the accused on bail pending the trial in the Sessions Court.

Bail on the same terms as before.

V. N. V. *Commitment ordered.*

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 846 OF 1926.
November 2, 1926.

Present:—Mr Justice Harrison and Mr. Justice Dalip Singh.

MANI RAM—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 84—Unsoundness of mind, definition of—Evidence of unsoundness of mind, what constitutes.

The mere co-existence of the five circumstances

namely, (1) the absence of any motive, (2) absence of secrecy, (3) multiple murders, (4) want of pre-arrangement, and (5) want of accomplices, is not sufficient by itself to prove unsoundness of mind within the meaning of s. 84, Penal Code. The law requires proof of incapacity to realise the nature of the act, and presumes that where a man's mind or his faculties of ratiocination are sufficiently clear to apprehend what he is doing he must always be presumed to intend the consequences of the action he takes.

A man may be suffering from insanity in the sense in which the words would be used by an alienist but may not be suffering from unsoundness of mind within the meaning of s. 84, Penal Code.

Criminal appeal from an order of the Sessions Judge, Karnal, dated the 6th July, 1926.

Mr. *Shamair Chand*, for the Appellant.

Diwan *Ram Lal*, Assistant Legal Remembrancer, for the Respondent.

JUDGMENT.—The facts of this case are absolutely clear and Counsel does not question the correctness of the evidence by which they are proved.

One Mani Ram a man of 50 years of age murdered four persons with a *gandasa* in rapid succession. These were his two nephews aged 4 and 12, *Musammat* Balam Kaur the wife of his neighbour aged 30, and her boy Fatta aged 4. One Ram Sarup was passing the house of Kirpa, the neighbour, and on hearing cries went in and saw Mani Ram striking *Musammat* Balam Kaur with a *gandasa*. He said "O butcher, what are you doing?" On this Mani Ram dropped the *gandasa* and ran away, and was caught with the assistance of Sheo Datt and Hardat Singh. On going into the room where the corpse of *Musammat* Balam Kaur was lying Fatta her child was found murdered and Ram Kishan the younger nephew of Mani Ram was lying seriously wounded. This boy was taken to Hospital where he died and stated before his death that his uncle had killed him. When they were ready to start for the *thana* a remark was made that Sarupa, the elder son of the brother Sri Ram was also missing and the accused volunteered the information that he had murdered him and thrown him into Nathuwali Johri where he was found

Such are the facts and the only point agitated before us is that the very nature of the acts committed establishes that Mani Ram must have been suffering from "unsoundness of mind," in the sense in which the words are used in s. 84 of the Indian Penal Code. Four witnesses were produced for his defence but their evidence is of no value. and Counsel urges that the conduct of Mani Ram coupled with the presence of the five circumstances detailed both in Lyon's Jurisprudence and Modi's Jurisprudence leads to the irresistible conclusion that he was suffering not only from paralysis of the will but also from paralysis of the mind in the sense that he was incapable of knowing the nature of the act or that he was doing what was either wrong or contrary to law. These five circumstances are:—

1. The absence of any motive.
2. The absence of secrecy.
3. Multiple murders.
4. Want of pre-arrangement, and
5. Want of accomplices.

These five circumstances all do exist in this case, but Counsel has been unable to satisfy us that the mere presence of these five circumstances fulfil the requirements of s. 84 of the Indian Penal Code. The words there used are very clear, and it is a common place that a man may be suffering from insanity in the sense in which the words would be used by an alienist, but may not be suffering from unsoundness of mind as defined in s. 84. The law recognises nothing but incapacity to realise the nature of the act, and presumes that where a man's mind or his faculties of ratiocination are sufficiently clear to apprehend what he is doing he must always be presumed to intend the consequences of the action he takes. It is perfectly clear in this case from the conduct of the accused, from the fact that he dropped the *gandasa*, from the fact that he began to run away, and from the fact that he volunteered the information that he had murdered the elder nephew that he knew what he was doing and that what he was doing was wrong. We have no option in the matter but to find that the accused has wholly failed to establish unsoundness of mind.

We, therefore, dismiss his appeal and confirm the sentence of death.

R. L. *Appeal dismissed.*

BOMBAY HIGH COURT.
FULL BENCH.

CRIMINAL APPLICATION FOR REVISION
No. 215 OF 1926
August 31, 1926.

Present:—Sir Amberson Marten, KT., Chief Justice, Justice Sir Lallubhai Shah, KT., Mr. Justice Fawcett, Mr. Justice Kemp and Mr. Justice Mirza.

NANOO SHEIKH AHMED
AND ANOTHER—APPLICANTS
versus
EMPEROR—OPPOSITE PARTY.

Evidence Act (I of 1872), ss. 25, 125—Bombay Abkari Act (V of 1878), ss. 41, 43—Abkari Officer exercising powers of Police Officer, whether Police Officer—Confession to such officer, admissibility of—'Police Officer,' meaning of.

Held by the Full Bench.—An Abkari Officer, who, in the conduct of investigation of an offence punishable under the Bombay Abkari Act exercises the powers conferred by the Cr. P. C., 1898, upon an officer in charge of a Police Station for the investigation of a cognisable offence is a Police Officer within the meaning of s. 25 of the Evidence Act. [p. 334, col. 2.]

Raphael Pereira v. *Emperor* (1), overruled.

Per *Shah* and *Fawcett, JJ.*—The term 'Police Officer' in s. 25 of the Evidence Act should not be read in any strict technical sense but includes an officer vested with the powers of the Police by law. [p. 335, col. 2; p. 336, col. 1.]

Criminal application for revision from convictions and sentences passed by the Acting Sixth Presidency Magistrate, Bombay.

ORDER OF REFERENCE TO A FULL BENCH.

Shah and Fawcett, JJ.—(*August 5, 1926*).—This is an application in revision by the accused who were charged under s. 43, sub-s. (1), cl. (*i*), of the Bombay Abkari Act (Bom. Act V of 1878), as amended by subsequent Acts, read with s. 114 of the Indian Penal Code. The learned Acting Sixth Presidency Magistrate who tried the case, was of opinion, on the evidence, apart from the confessions of the two accused, which were recorded before the Excise Inspector and put in as Ex. F in the case, that the story for the defence appeared as probable as the story for the prosecution; but, relying upon the confessions the learned Magistrate convicted the two accused and sentenced them to pay certain fines.

It was urged before the lower Court that the confessions recorded before the Excise Inspector, were not admissible in evidence in view of s. 25 of the Indian Evidence Act. The learned Magistrate, however, overruled that objection having regard to the recent judgment of this Court in *Raphael Pereira* v. *Emperor* (1).

The first objection raised on behalf of the applicants is that these confessions are not admissible in evidence, as an Excise Officer, who is investigating an offence and who has all the powers of an officer in charge of a Police Station for the investigation of a cognizable offence, as provided in s. 41 of the Abkari Act, is a Police Officer within the meaning of s. 25 of the Indian Evidence Act. It is further contended that, under Ch. XIV of the Cr. P. C., confessions must be recorded as required by s. 164 of the Code. In support of the contention relating to s. 25 of the Indian Evidence Act, reliance is placed upon the decision in *Queen-Empress* v. *Salemuddin Sheik* (2). In that case it was held that a statement before a *chowkidar* was not admissible in evidence under s. 25. The observations of Garth, C. J., in *Queen* v. *Hurribole Chunder Ghose* (3), are also relied upon as showing that, for the purposes of s. 25 of the Indian Evidence Act, "the term 'Police Officer' should be read not in any strict technical sense, but according to its more comprehensive and popular meaning." The learned Pleader also relies upon the view taken by this Court in *Queen-Empress* v. *Bhima* (4) where these observations were referred to with approval and where a Police Patel, under the Village Police Act in force in the Bombay Presidency, was held to be a Police Officer within the meaning of s. 25. As regards the decision in *Raphael Pereira* v. *Emperor* (1), where it has been held, with reference to the provisions of the Indian Opium Act, I of 1878 as amended by Bombay Act II of 1923, that an Excise Officer is not a Police Officer within the meaning of s. 25, it is pointed out that the decision is really based upon the observations in *Ah Foong* v. *Emperor* (5) and that the observations in the Calcutta case

(1) 97 Ind. Cas. 665; 28 Bom. L. R. 674; 27 Cr. L. J.

(2) 26 C. 569; 3 C. W. N. 393; 13 Ind. Dec. (N. S.) 965.

(3) 1 C. 207; 25 W. R. Cr. 36; 1 Ind. Dec. (N. S.) 132.

(4) 17 B. 485; 9 Ind. Dec. (N. S.) 315.

(5) 48 Ind. Cas. 504; 46 C. 411; 22 C. W. N. 834; 28 C. L. J. 105; 20 Cr. L. J. 24.

were made with reference to an Excise Officer under the Opium Act of 1878, as it stood in 1918. It is pointed out that s. 20 of Act I of 1878, as it stood then, was substantially different in terms from the section as amended by Bombay Act II of 1923. Section 20 of Act I of 1878, as it stood then, was in these terms:—

"Every person arrested, and thing seized, under s. 14 or s. 15, shall be forwarded without delay to the officer in charge of the nearest Police Station; and every person arrested and thing seized under s. 19 shall be forwarded without delay to the officer by whom the warrant was issued."

The learned Pleader for the applicants states to the Court that, in spite of the search made by him, he has not been able to find any amendment of this s. 20 at the date of this decision. We have also tried to see whether s. 20 of the Opium Act, at the date of decision in *Ah Foong* v. *Emperor* (5), was as stated above, and we have not been able to find any Act either of the Indian Legislature, or of the local Legislature in Bengal, altering s. 20. Therefore, presumably the decision in *Ah Foong* v. *Emperor* (5) must be taken to be a decision with reference to s. 20 of Act I of 1878 as it stood at the date of that decision. It is pointed out that, when the case in *Raphael Pereira* v. *Emperor* (1) came to be decided, reliance was placed entirely upon these observations which must be taken to have been made without reference to s. 20 as it stood in the Bombay Presidency at the date of the decision in *Raphael Pereira* v. *Emperor* (1) as amended by Bombay Act II of 1923. It is contended, with reference to the section as amended and as quoted in that case, that an officer exercising powers which are exercised by an officer in charge of a Police Station under the Cr. P. C. is in substance a Police Officer for the purposes of s. 25, having regard to the reason of the rule contained in s. 25 of the Indian Evidence Act.

On the other hand, the learned Government Pleader has contended that, apart from the confessions, there is sufficient evidence in the case to justify the convictions. That, however, is a point which we have not considered at this stage.

As regards the point relating to the admissibility of the confessions in the case, or of the statements made before the Excise Inspector as the learned Government Pleader described them, it is contended that though the Excise Officer may have the powers of an officer in charge of a Police Station, under s. 41 of the Bombay Abkari Act of 1878 as amended by Act XII of 1912, it does not follow that he is a Police Officer within the meaning of s. 25. He relies upon *Raphael Pereira* v. *Emperor* (1) and also upon the decisions of other Courts which are not reported in the Indian Law Reports Series. Without referring to these other cases, his contention, in effect, is that an Excise Officer remains an Excise Officer even though he may exercise all the powers of an officer in charge of a Police Station for the purpose of investigating an offence under s. 41, and that s. 25 of the Indian Evidence Act should be strictly construed so as not to make it applicable to officers who really are not Police Officers.

We have considered these respective contentions and it is clear that the point that arises with reference to the admissibility of these confessions is one of great practical importance. As at present advised, we are not prepared to accept the decision in *Raphael Pereira* v. *Emperor* (1) as correctly interpreting s. 25 of the Indian Evidence Act, or as governing the point arising under s. 41 of the Bombay Abkari Act. The wording of s. 20 of the Opium Act, as amended by Bombay Act II of 1923, is slightly different from that of s. 41 of the Bombay Abkari Act. We feel some difficulty in accepting the view that, when an Abkari Officer of the rank prescribed by s. 41, sub-s. (1), charged with the conduct of investigation of an offence under the Abkari Act, exercises, in the conduct of such investigation, the powers conferred by the Cr. P. C., 1898, upon an officer in charge of a Police Station for the investigation of a cognizable offence, he is not a Police Officer within the meaning of s. 25 of the Indian Evidence Act. The rule laid down in s. 25 of the Indian Evidence Act is one of substance and not merely one of form. We do not desire to express any opinion on this point at this stage. We think that the point requires to be considered by a Full Bench in view of its practical importance and of the difficulty that we feel in following *Raphael Pereira* v. *Emperor* (1). We refer the following question to a Full Bench:—

"Is an Abkari Officer, who, in the conduct of investigation of an offence punish-

able under the Bombay Abkari Act, exercises the powers conferred by the Cr. P. C, 1898, upon an officer in charge of a Police Station for the investigation of a cognizable offence, a Police Officer within the meaning of s. 25 of the Indian Evidence Act?"

All other questions arising on this application are reserved.

The Reference was heard by a Full Bench composed of Marten, C. J., and Shah, Fawcett, Kemp, and Mirza, JJ.

Mr. *M. A. F. Coelho*, for the Applicants.

Mr. *Kanga*, Advocate-General, (with him Mr. *P. B. Shingne*, Acting Government Pleader), for the Crown.

JUDGMENT OF THE FULL BENCH.

Marten, C. J.—The question for this Full Bench is:—

"Is an Abkari Officer, who, in the conduct of investigation of an offence punishable under the Bombay Abkari Act, exercises the powers conferred by the Cr. P. C., 1898, upon an officer in charge of a Police Station for the investigation of a cognizable offence, a Police Officer within the meaning of s. 25 of the Indian Evidence Act?"

The case itself has a somewhat sordid, if not petty, origin. The accused are alleged to have fallen into a trap laid for them by an Excise Officer, and to have sold to him two bottles of beer under the mistaken belief that he was visiting the brothel, in which the accused are apparently interested The Magistrate has fined the accused Rs. 10 and Rs. 20 respectively, and they have applied in revision to the High Court.

In convicting the accused, the Magistrate has relied upon a certain confession alleged to have been made by them to the Excise Officer. It is contended that this confession was inadmissible in evidence having regard to s. 25 of the Evidence Act. Accordingly, the Division Bench have submitted this question to the Full Bench for decision.

Now, s. 25 of the Indian Evidence Act provides:—

"No confession made to a Police Officer shall be proved as against a person accused of any offence."

I may also refer to s. 125, which provides:—

"No Magistrate or Police Officer shall be compelled to say whence he got any information as to the commission of any offence, and no Revenue Officer shall be compelled to say whence he got any information as to the commission of any offence against the public revenue.

"*Explanation.*—'Revenue Officer' in this section means any officer employed in or about the business of any branch of public revenue."

Was then the Excise Officer, in the present case, a Police Officer within the meaning of s 25? Now, it is quite clear that, under the Bombay Abkari Act, 1878, as amended by subsequent Acts, certain important powers possessed by the ordinary Police, under the Cr. P. C., are given to particular Abkari Officers.

Section 41 provides:—

"(1) Every Abkari Officer not below such rank as Government may prescribe shall within the area for which he is appointed have power to investigate all offences punishable under this Act.

"(2) Every such officer shall in the conduct of such investigation exercise the powers conferred by the Cr. P. C., 1898, upon an officer in charge of a Police Station for the investigation of a cognizable offence:—....."

Then, by s. 36 of the Abkari Act they have powers of entry into buildings, and of detention, search and arrest of persons, who, they have reason to believe, are guilty of offences under the Abkari Act. There are also certain special powers of arrest under s. 38A; and s. 3 B provides for what is to be done as regards a person arrested under s. 38A. Section 38C provides:—

"The provisions of s. 61 of the Cr. P. C., 1898, shall apply to all arrests made without warrant by Abkari Officers."

Then, under s. 40, any Abkari Officer duly empowered in this behalf may issue a warrant for arrest and search.

Next, if one turns to the Cr. P. C., it will be found in Ch. XIV, what are the powers conferred upon an officer in charge of a Police Station with regard to cognizable offences. The sections in that Chapter mainly deal with investigation. They include the important power of examining persons supposed to be acquainted with the facts (see s 161). The powers of arrest, so far as the Cr. P. C. is concerned, are contained in other sections. But, even though an arrest by an Abkari Officer in any particular case may be under the express provisions of the Abkari Act, yet it is clear that the highly important stage of investi-

gation, which is conducted ordinarily under the Cr. P. C. by an officer in charge of a Police Station, may here be conducted, not by that officer, but by an Excise Officer. The result, in my opinion, is that either under the one Act or the other, *viz.*, the Abkari Act or the Cr. P. C., the learned Magistrate has been correct in saying:

"The powers of the Excise and Police Officers are identical as regards the arrest of accused persons, their detention in custody, and investigation of offence."

Substantially, therefore, to all intents and purposes, we get here a person exercising all the material powers of a Police Officer, although he is not officially called by that name, but by the name of an Excise Officer.

Now, what was the object of s. 25 of the Evidence Act? It was, I take it, to prevent the abuse of their powers by the Police in this country in extorting confessions from persons in their custody; and I take it that one of the most important periods, during which the accused persons were intended to be protected by the Legislature, was when the case was being investigated by the Police Officers and when the accused were perhaps solely in Police custody and not allowed to see any other person. Therefore, so far as the spirit of the Act is concerned, we have the same possibilities of evil when an Excise Officer investigates a case, as we should have in the case of an investigation by Police Officers in charge of a Police Station under the Cr. P. C.

How, then, have the Indian High Courts interpreted s. 25 of the Evidence Act? The case of *Queen* v. *Hurribole Chunder Ghose* (3), decided by Chief Justice Sir Richard Garth and Mr Justice Pontifex, (who also became Chief Justice), is generally regarded as the leading case, and has, at any rate, been followed in this Court. That was a case as to whether a Deputy Commissioner of Police could properly be described as a Police Officer, within the meaning of s. 25 of the Evidence Act. He was also a Magistrate, and it was accordingly contended that, the confession having been made to him as a Magistrate, it was admissible under s. 26 and that s. 26 overrode s. 25. Dealing with this argument the Chief Justice at page 215* says with respect to s. 25:—

"Its humane object is to prevent confessions obtained from accused persons through any undue influence, being received as evidence against them...I consider that the term 'Police Officer' should be read not in any strict technical sense, but according to its more comprehensive and popular meaning."

Then he remarks at page 216*:—

"...and I think it better in construing a section such as the 25th which was intended as a wholesome protection to the accused, to construe it in its widest and most popular signification."

Accordingly, it was held that the confession in question was made to a Police Officer and was, therefore, inadmissible.

In *Queen-Empress* v. *Bhima* (4) the question arose as to a Police Patel. It was there held by a Division Bench of this Court that a Police Patel is a Police Officer within the meaning of s. 25. The judgment states (page 486†):—

"We follow *Queen* v. *Hurribole Chunder Ghose* (3) in which it was held that the term 'Police Officer' in these sections should be read not in any strict technical sense, but according to its more comprehensive and popular meaning, and we are of opinion that the evidence of the confession was inadmissible."

There is another case in *Queen-Empress* v. *Salemuddin Sheik* (2) which was a case of a *chowkidar* in Bengal, and it was there held, by Mr. Justice Prinsep and Mr. Justice Stanley, that a *chowkidar* is a Police Officer within the meaning of s. 25.

I next turn to a decision in *Ah Foong* v. *Emperor* (5) by Sir Lancelot Sanderson, C. J. and Mr. Justice Beachcroft. Now, that was not a decision under the Abkari Act, but was a decision under the Opium Act. Moreover, this important distinction is to be borne in mind, that though, under the Opium Act of 1878, there was given to the Excise Officers certain limited powers of arrest, yet in Bengal, as opposed to Bombay, there have not been conferred on an Excise Officer the powers of investigation and so on, which I have already alluded to. Accordingly, the Calcutta Court was dealing with a case where the officer at most had a limited power of arrest. It is urged by the Pleader for the accused in his able argument, that this decision of the Calcutta Court was *obiter*, because the Court held that, in any event, the alleged confessions were not confessions within the meaning of s. 25 or 30, as they were really in the nature of exculpatory statements: (see page 418) But I am not prepared to distinguish

*Pages 1 C.—[*Ed.*]

†Page of 17 B.—[*Ed.*]

that case on that ground. The Court took the point as to s. 25 first, and held that the alleged confessions were admissible under s. 25. Consequently, that was sufficient to dispose of the case, and they need not have gone into the further point as to whether the alleged confessions could be taken into consideration against the co-accused under s. 30. The judgment of Sir Lancelot Sanderson does not deal in any detail with the point which we have to consider. Substantially, his judgment is contained in these words (page 419*):—

"I do not think it is possible that the Excise Officers in this case could be said to be Police Officers, and that the statements made by the first and the second accused were not admissible by reason of the fact that they were made to Police Officers."

Next, we come to the decision of Sir Norman Macleod and Mr. Justice Crump, on April 7 last, in *Raphael Pereira* v. *Emperor* (1). This was another opium case and the Court followed the above Calcutta decision. The learned Magistrate in the present case felt himself bound by this Bombay decision, and, accordingly, contrary to his own view, admitted the alleged confession of the present accused in evidence. It appears from the report that the learned Chief Justice considered that the point they had to consider was exactly the same point as in the Calcutta case, for he says, "The same point was considered in *Ah Foong* v. *Emperor* (5)." Then, after quoting the Calcutta decision he states: "In my judgment that judgment should be followed. We, therefore, dismiss the appeal."

Now, with great respect to the learned Chief Justice, it does not appear to have been made clear to him that in Bombay the powers of the Excise Officers under the Abkari Act are far more extensive than in Calcutta. In Bombay, the Opium Act has been expressly amended, so as to confer upon Abkari Officers certain wide Police powers, which are very similar to those conferred on them as regards offences under the Abkari Act, *e. g.*, the same powers of investigation as those possessed by an officer in charge of a Police Station. Under these circumstances, it seems to me that the Calcutta case is clearly distinguishable and that in following that case, without referring to the important distinction which at present exists between the powers possessed by the Calcutta and Bombay Excise Officers respectively, the learned Judges in the Bombay case fell into an error.

The result is that there is no authority precisely in point in this case, and we have really to determine a new point. After giving, then, my best attention to the arguments, which have been addressed to us, in my judgment, we should hold that as the Bombay Legislature has deliberately conferred upon these Abkari Officers substantially all the powers of a Police Officer they have thereby, in effect made them Police Officers within the meaning of s. 25, and that, accordingly, any confession made to such an officer in the course of his investigation under the Abkari Act, or the Cr. P. C., is inadmissible in evidence.

In this connection, I should like to point out that it was open to the Legislature or to Gevernment to do one of two or three things. It could detach ordinary Police Officers to investigate excise offences. Or, on the other hand, it could appoint other officers of Government or new officers to perform the duties of investigation and arrest and so on, which had previously been performed by ordinary Police Officers. Whichever course was adopted, any alleged offence would, in effect, be investigated by persons in the position of Policemen. In this very case it would appear that the effect of the above sections of the Abkari Act is that certain duties, which previously fell upon ordinary Police Officers, are in fact now being carried out by the Abkari Officers, who have been given these particular Police powers. We have even been told by Counsel that persons arrested for excise offences are not now taken to the ordinary Police Station, but are kept under arrest in the excise *choukies*. Whether this is so or not, I do not know. At any rate, it is sufficient for present purposes to say that many extensive powers were thus conferred on Excise Officers which previously could only have been exercised by ordinary members of the Police under the Cr. P. C. It seems to me, therefore, not to be an unduly wide construction of s. 25 to say that a Police Officer there includes an officer of Government with such wide Police powers as those we find here.

I should mention an argument addressed to us on s. 125 of the Evidence Act to the effect that, as the Legislature distinguishes there between Polic Officers and Revenue

*Page of 46 C.—[*Ed.*

Officers a similar distinction should be made in construing s. 25. I think the answer to that is given by Mr. Coelho. The Evidence Act was passed in 1872, and this particular provision in s. 125 was passed in 1887, and, therefore, before the present amended sections of the Bombay Abkari Act came in force. For instance, the Police powers given by the present ss. 41, 41A, 41B and 41C, were conferred by s. 25 of the Bombay Abkari (Amendment) Act, 1912 (Bom. Act XII of 1912). It may, therefore, be that, since the amending Act of 1912, certain Excise-Officers in Bombay are Police Officers as well as Revenue Officers under s. 125. On the other hand, it does not follow that every Revenue Officer under s. 125 is also a Police Officer. It will depend on whether he has had conferred upon him the exceptional powers referred to in the Abkari Act.

On a careful consideration, then, of the whole case, I would answer the question submitted to us in the affirmative, and hold that the confession in question was inadmissible in evidence.

Shah, J.—I am of the same opinion, generally for the reasons given by my Lord the Cheif Justice. Having regard to the importance of the point, as also to the fact that in effect we are differing from the view taken by Macleod, C. J., and Crump, J., in *Raphael Pereira* v. *Emperor* (1) I desire to add a few words by way of further reasons for this conclusion.

Having regard to the reason of the rule laid down in s. 25 of the Indian Evidence Act, and having regard to the decisions which have been already referred to, it is clear to my mind that the term 'Police Officer' used in the section is not to be understood in any technical sense, but includes an officer who is vested with the powers of the Police by law. In the present case the officer concerned has got certain powers under the sections of the Bombay Abkari Act. It is not necessary for me to refer to all the sections under which he has got certain limited powers of arrest and search. But it is important to note that, before the present s. 41 was enacted by the Amending Act (Bom. Act XII of 1912), under the old s. 41 he had practically no powers of investigation, and that, after an accused person was arrested, it was part of his duty to send him to an officer in charge of a Police Station. That section, as it stood before 1912, was altered by the Legislature and it has been provided in sub-s. (2) of s. 41 that :—

"Every such officer [*i. e.*, the officer referred to in sub-s (1)] shall in the conduct of such investigation exercise the powers conferred by the Cr. P. C., 1898, upon an officer in charge of a Police Station for the investigation of a cognizable offence."

Taking the other sections of the Act under which he has got certain limited powers of arrest and search along with the powers contained in the Cr. P. C., which a Police Officer in charge of a Police Station is able to exercise, it is clear to my mind that the officer contemplated by s. 41, sub-s. (1), is virtually in the same position as a Police Officer with regard to the investigation of the offences under the Abkari Act. It seems to me a perfectly fair interpretation of s. 25 to say that the Police Officer within the meaning of that section is an officer, who exercises the powers of Police conferred upon him by law, whether he is called a Police Officer or he is called by any other name and exercises other functions also under other provisions of law. He is a Police Officer within the meaning of s. 25, if in the investigation of offences under a paticular Act, he exercises the powers of an officer in charge of a Police Station for the investigation of a cognizable offence conferred upon him by that Act. Section 25 of the Indian Evidence Act embodies an important rule, which is to be given effect to as a matter of substance and not as a mere matter of form. It is not merely the name given to an officer that should determine whether he is a Palice Officer, but the substantial fact whether he exercises the powers of a Police Officer conferred upon him by law should determine it.

In taking this view of s. 25, it is essential and quite proper to bear in mind the purpose of the section. That purpose has been already stated. It has been discussed in *Queen Empress* v. *Babu Lal* (6). In the words of Oldfied, J. (page 513*), "The broad ground for not admitting confessions made to a Police Officer is to avoid the danger of admitting false confessions." That ground would apply as much to an Excise Officer exercising the powers conferred upon him by s. 41 of the Abkari Act as amended as to a Police Officer.

(6) 6 A. 509; A. W. N. (1884) 229; 4 Ind. Dec. (N. S.) 155 (F. B.).

*Page of 6 A.—[*Ed.*]

I should add a word with regard to the case of *Raphael Pereira* v. *Emperor* (1). It is perfectly true, as appears from the judgment, that the learned Judges had before them s. 20 of the Opium Act as amended by Bombay Act II of 1923. But, it is not clear from the judgment as to whether they had before them the fact that s. 20 of the Opium Act was not so amended by any Bengal Act. However, that may be, the case shows that the learned Judges were prepared to hold that Excise Officers exercising the powers, under s. 20 of the Opium Act as amended by the Bombay Act, would not be Police Officers. With the utmost respect I am unable to accept that view, which does not appear to me to accord with the true meaning of s. 25 of the Indian Evidence Act.

Fawcett, J.—I am of the same opinion. The view taken in the leading case, *Queen* v. *Hurribole Chunder Ghose* (3), that the term 'Police Officers' in s. 25 of the Evidence Act should be read not in any strict technical sense, but according to its more comprehensive and popular meaning, is one which was arrived at only four years after the Evidence Act was enacted. That construction has been followed by this Court, as well as other High Courts; and, if the Legislature had considered that that was a wrong construction to put upon the term 'Police Officer' in s. 25 of the Evidence Act, the probability is that the section would have been amended so as to overrule such a construction. Therefore, when the learned Advocate-General contends that s. 25 of the Evidence Act does not cover a Revenue Officer, or any other officer, on whom by Statute certain powers of the Police are conferred and that to say it does cover such an officer is to read the section as if it said "including officers who can reasonably be regarded as Police Officers", then the answer is that we are merely acting on a construction adopted by the Courts long ago and tacitly accepted by the Legislature. I think an important fact to be borne in mind is that, prior to the amendment of the Abkari Act by Bombay Act XII of 1912, an Excise Officer after arresting a person had forthwith to send him to the nearest Police Station and the investigation was then conducted by Police Officers, whereas now, an Excise Officer, if empowered under s. 41, can exercise Police powers of investigation, which cover a certain amount of detention of the accused while the investigation is going on, so that he has similar opportunities of extorting a confession from an accused. This is an all important difference which distinguishes this case from that of *Ah Foong* v. *Emperor* (5) as has been pointed out by my Lord the Chief Justice.

Kemp, J.—I think the question should be answered in the affirmative. I consider, however, that the matter is not entirely free from doubt. It may, with some show of reason, be contended by the Crown that after all an Abkari Inspector is not a 'Police Officer.' His pay, pension, prospects and the conditions of his service are different to those of a Police Officer. So he is not as an actual fact a 'Police Officer.' Moreover it does not follow that because some of the duties of a particular officer are conferred on any other officer, the second officer thereby becomes a member of the service of the first officer. Nevertheless, I am of opinion that, under the circumstances of this case the Abkari Inspector, invested with the powers of an officer in charge of a Police Station under the Cr. P. C. should be regarded as a 'Police Officer' under s. 25 of the Evidence Act. It will be noted that, prior to the Bombay Amending Act XII of 1912, any confession made to a Police Officer in charge of a Police Station in the course of his investigation of any offence was disallowed. The Local Government could not have intended, by delegating the investigation of offences under the Abkari Act to an Abkari Inspector, to deprive a person accused of an offence under the Abkari Act of the protection he enjoyed under s 25 of the Evidence Act before Bombay Act XII of 1912 was passed. To hold otherwise would be to cut down the protection intended to be afforded by s. 25 of the Evidence Act, which is an Act of the Government of India, to accused persons. Although I agree that the term 'Police Officer' should not be construed as strictly as the Advocate-General contends, I do not, at the same time, agree that it is safe to lay down generally that the term should be construed in its popular and most comprehensive sense. The popular meaning of the term when *Queen* v. *Hurribole Chunder Ghose* (3) was decided may not be co-extensive with the popular meaning of the term at any time thereafter.

I do not consider it necessary to further discuss the cases. I arrive at my conclusion on the particular circumstances of thi

case. My answer to the question is in the affirmative.

Mirza, J.—I agree that the answer to the question submitted should be in the affirmative.

Reference answered accordingly.

A. N. A.

MADRAS HIGH COURT.
FULL BENCH.

CRIMINAL REVISION CASE No. 790 OF 1925.
(CRIMINAL REVISION PETITION No. 649 OF 1925).

April 29, 1926.

Present:—Sir Victor Murray Coutts Trotter, KT., Chief Justice, Mr. Justice Devadoss and Mr. Justice Wallace.

APPA RAO MUDALIAR—ACCUSED—PETITIONER

versus

JANAKIAMMAL—COMPLAINANT—RESPONDENT.

Cr. P. C. (Act V of 1898), ss. 202, 203, 204, 236—Proceedings under s. 202—Magistrate, jurisdiction of, to require presence of accused—Complaint, dismissal of—Further inquiry, order directing—Notice to accused, whether necessary.

A Magistrate has no jurisdiction to require the presence of the accused at an enquiry or investigation under s. 202, Cr. P. C., into a complaint of which he is empowered to take cognizance or which has been transferred to him under s. 192. [p. 337, col. 1; p. 338, col. 1.]

Varadarajulu Nayudu v. *Kuppusami Nayudu* (1), followed.

An order under s. 436 of the Cr. P. C. for further enquiry into a complaint dismissed under s. 203 of the Code is not bad for want of notice to the accused. [p. 338, col. 1.]

Gajraj Singh v. *Emperor* (2), followed.

Per *Devadoss, J.*—The practice of issuing notice to the accused under s. 202, Cr. P. C., though not illegal is highly undesirable as it defeats the specified object of s. 202, namely, to prevent the harassing of innocent persons by an indiscriminate issue of processes in cases where there is no sufficient ground for proceeding against them. [p. 338, col. 2.]

An accused person is said to be discharged when the case against him is thrown out under ss. 209, 253, or 259 or when the Advocate-General enters a *nolle prosequi* under s. 333 of the Cr. P. C. The expression "person who has been discharged" in s. 436 refers to "a person who has been discharged" under ss. 209, 253 or 259. A person against whom no process has been issued under s. 204 is not a discharged person and, therefore, no notice is necessary to him when the District Magistrate or the Sessions Court or the High Court directs further enquiry into a complaint dismissed under s. 203 or sub-s. (3) of s. 204. [p. 339, col. 1.]

Petition, under ss. 435 and 439 of the Cr. P. C, 1898, praying the High Court to revise an order, dated the 1st December 1925, of the District Magistrate, Chingleput, in Cr. R C. No. 45 of 1925, (C. C No 443 of 1925, on the file of the Court of the Stationary Second Class Magistrate, Ponneri.)

Mr. *K. Narasimha Iyer*, for the Petitioner.

Mr. *N. A. Krishna Iyer*, for the Respondent.

The Public Prosecutor, for the Crown.

ORDER.

Coutts Trotter, C. J.—I have had the advantage of perusing the judgment about to be delivered by my brother Devadoss and I entirely agree in the conclusion that he has arrived at, a conclusion which was also arrived at by Wallace, J., in *Varadarajulu Nayudu* v. *Kuppusami Nayudu* (1). As I also find myself in complete accord with the reasoning of those learned Judges, it is unnecessary for me to add more than a few words. It may no doubt happen from time to time that to allow a proposed accused person to appear and to hear what he has to say while the proceedings are at the stage contemplated by s. 202 of the Cr. P. C might turn the scale and satisfy the Magistrate that there was no case for issuing process under s. 204. I make no doubt that it is in this view that Magistrates have been in the habit of giving a person against whom a charge is formulated at least an option to come before them if he so desires at the earliest stage. It seems to me that such a procedure is entirely unwarranted by the Code The object of the Chapter of the Code in which s 202 appears is to prevent accused persons being harassed at all or asked to appear if in the opinion of the Magistrate no *prima facie* case is made out, and in my opinion the Code never contemplated that at that stage they should be either asked or permitted to state their cases. That is really enough to dispose of this matter but I am also of opinion that the practice of summoning accused persons at the stage marked by s. 202 has much greater dangers than safeguards to the accused. He is obviously not bound to appear even if invited or given an opportunity of doing so If he does not appear, it is likely to weigh against him with the Magistrate; if he does, he runs the danger of being committed to a statement of his case before he knows with any definiteness what exactly is laid to his charge. The argu-

(1) 99 Ind. Cas. 321; 51 M. L. J. 602, 28 Cr. L. J. 113.

ment that because Mr. Narasimha Iyer's client in fact appeared before the Magistrate when the proceedings were at the stage of preliminary inquiry under s. 202 he is, therefore, entitled to be heard when that proceeding is questioned in a higher Court is to my mind quite untenable. This appellant has never been discharged because he had never been charged.

I should like to say in conclusion that I entirely endorse the strictures passed by Devadoss, J., on the remarks contained in the order of the District Magistrate which in effect really prejudge the case. I agree with the order proposed by Devadoss, J.

Devadoss, J.—This is an application to revise the order of the District Magistrate of Chingleput directing further enquiry into a complaint dismissed under s. 203 of the Cr P. C., by the Stationary Second Class Magistrate of Ponneri. At the request of the Public Prosecutor, the learned Chief Justice has directed that this criminal revision petition be heard by a Full Bench as one of the questions involved affects the practice prevailing in the Magistrates' Courts Two questions arise for consideration (1) Has a Magistrate jurisdiction to require the presence of the accused when he holds an enquiry or investigation under s. 202 of the Cr. P. C., into a complaint of which he is empowered to take cognisance or which has been transferred to him under s. 192? and (2) Is an order under s 436 of the Cr. P C, for further enquiry into a complaint dismissed under s. 203 bad for want of notice to the accused?

First point:—When a complaint is presented or transferred to a Magistrate he may after examining the complainant on oath, dismiss the complaint under s. 203 if there is in his judgment no sufficient ground for proceeding and if there is sufficient ground for proceeding he shall issue a summons or warrant under s. 204 for the attendance of the accused. Section 202 authorises a Magistrate for reasons to be recorded in writing to postpone the issue of process for compelling the attendance of the person complained against, and either enquire into the case himself or direct an enquiry or investigation to be made by a Magistrate subordinate to him or by a Police Officer, or by such other person as he thinks fit, for the purpose of ascertaining the truth or falsehood of the complaint. The object of s. 202 is to prevent the harassing of innocent persons by an indiscriminate issue of processes in cases where there is no sufficient ground for proceeding against them. Unless and until a Magistrate is satisfied that there is in his judgment sufficient ground for proceeding, he should not compel the appearance of the accused before him. It is to enable him to see that there is sufficient ground for proceeding that he is authorised to hold an enquiry by himself or by a Subordinate Magistrate or by a Police Officer or by any other fit person. The object of the section would be defeated if the accused is made to appear in an enquiry under s. 202. It is argued that the notice issued under s. 202 to the accused gives him an option to appear or not, and, therefore, it cannot be said that the Court compels his appearance when it issues notice to him under s. 202; but the option is rendered useless as his non-appearance might be construed into a disinclination on his part to be present at the enquiry and might create a prejudice in the mind of the Magistrate against him and if he appears, the object of the postponement of the process is practically nullified. Should the Magistrate after such enquiry think that there is in his judgment sufficient ground for proceeding, any statement made by him might prejudice him in the trial of the case, and if he declines to answer any question that may be put to him by the Magistrate, that might prejudice the Magistrate against him. This question has been exhaustively considered by my brother Wallace, J., in a recent case in *Varadarajulu Nayudu* v. *Kuppusami Nayudu* (1) and as I entirely agree with his conclusion and the reasons therefor, it is unnecessary to discuss the cases noticed by him. I hold that the practice of issuing notice to the accused under s. 202 is not illegal but is highly undesirable as it defeats the specified object of s. 202 and might prejudice the accused if the complaint is not dismissed under s. 202 and should, therefore, be put a stop to without delay.

Second point:—The proviso to s. 436, Cr. P. C., makes it clear that a person is entitled to notice before an order is made under that section if he has been discharged. When an accused person has not been discharged according to the provisions of the Cr. P. C., he is not entitled to notice when the District Magistrate or the Sessions Court or the High Court orders further enquiry into a complaint which has been

dismissed under s. 203, or sub-s. 3 of s. 204. Mr. Narasimha Iyer's contention is that in this case his client appeared before the Magistrate on a notice under s. 202 and as the complaint was dismissed, he must be considered to have been discharged. The dismissal of a complaint under s. 203 or sub-s. 3 of s. 204 is before the appearance of the accused, and no accused person can be said to be discharged when no process has been issued for his appearance. It is only where a Magistrate taking cognizance of an offence is of opinion that there is sufficient ground for proceeding, he issues a summons or warrant for the attendance of the accused. If the case is a summons case the trial is according to Ch. XX and when a complaint in a summons case is thrown out the accused is acquitted. In warrant cases the enquiry and trial are under Ch. XXI, and under s. 253 if the Magistrate finds that no case has been made out against the accused, which, if unrebutted would warrant his conviction he shall discharge him. An accused person is said to be discharged when the case against him is thrown out under ss. 209, 253 or 259 or when the Advocate-General enters *a nolle prosequi* under s. 333. The expression "person who has been discharged" in s. 436 refers to a person who has been discharged under ss. 209, 253 or 259. A person against whom no process has been issued under s. 204 is not a discharged person and, therefore, no notice is necessary to him when the District Magistrate or the Sessions Court or the High Court directs further enquiry into a complaint dismissed under s. 203 or sub-s. 3 of s. 204. The same view was held in *Gajraj Singh* v. *Emperor* (2). The answer to the second question is in the negative.

Mr. Narasimha Iyer very properly contends that his client would be prejudiced by certain remarks of the District Magistrate in his order. He calls a letter produced by the accused as a spurious letter. The evidence on record does not warrant such an opinion of the letter. Again, the observation, "accused was certainly liable for trespass, insult and assault as complained by the complainant" is tantamount to a finding that the accused is guilty. Without the evidence of both sides it is not proper for any Court to come to a definite conclusion that an accused person is guilty of an offence. The Stationary Sub-Magistrate followed the practice which though condemned by a decision of this Court reported in *Sheik Meeran Saib* v. *Ratnavelu Mudaly* (3) seems to be in vogue throughout the Presidency and there is no reason for transferring the case for further enquiry to another Magistrate. Any Magistrate who enquires into this case will ignore the observations of the District Magistrate as regards the merits of the case and come to a conclusion on the evidence that might be adduced before him as to the guilt or the innocence of the accused. There is no reason to interfere with the order of the District Magistrate except setting aside that portion of the order by which the case is transferred to the Taluk Magistrate of Ponneri.

The case will be enquired into by the Stationary Sub-Magistrate of Ponneri who, if he thinks proper, may hold an enquiry under s. 202 before issuing process to the accused in order to satisfy himself that there is sufficient ground for proceeding. If he is not satisfied he may dismiss the complaint under s. 203; if he is satisfied that there is sufficient ground for proceeding he shall issue process under s. 204.

Wallace, J.—I entirely agree. On the first point I have already said all that I wish to say in my judgment in *Varadarajulu Naidu Kuppusami Nayudu* (1).

On the second point I agree that an accused to whom a process has not issued under s. 204 (1) has not "appeared" at the proceedings contemplated by Ch. XVIII and XXI and, therefore, cannot claim that a dismissal of the complaint under s. 203 of the Cr. P. C., amounts to a discharge.

V. N. V. *Order partly set aside.*

(2) 88 Ind. Cas. 600; 47 A. 722; 23 A. L. J. 451; L. R. 6 A. 119 Cr.; A. I. R. 1925 All. 537; 26 Cr. L. J. 1176.

(3) 21 Ind. Cas. 703; 37 M. 181; 25 M. L. J. 1.

RANGOON HIGH COURT.

CRIMINAL APPEAL No. 910 OF 1926.

August 9, 1926.

Present:—Justice Sir Benjamin Herbert Heald, KT.

EMPEROR—APPELLANT

versus

MA NU—ACCUSED—RESPONDENT.

Burma Municipal Act (III of 1898), s. 121—Municipal Committee—Power to demand reasonable access to and passage over lands of private owners for scavenging purposes.

Section 121 of the Burma Municipal Act empower

a Municipal Committee to require an owner to allow the servants of the Committee reasonable access to or passage over his land for scavenging purposes, whether these purposes concern the land in question or other land, the rights of the residents of the Municipality being protected by the provision that the access to or passage over the land must be reasonable.

Mapara v. *Municipal Committee of Mandalay* (1), followed.

Criminal appeal arising out of Criminal Summary Trial No. 50 of 1926, of the Court of the Honorary Magistrates, Moulmein.

JUDGMENT.—Respondent is occupier of a house in Moulmein Town and Ba Shin is her next-door neighbour. Ba Shin's house has been in existence for many years but respondent's was built only about a year ago. Each house has a privy at the back and hitherto the night-soil from both privies has been removed by way of a passage between the two houses. Recently the two neighbours quarrelled with the result that respondent has built a wall which cuts off access to Ba Shin's privy by that passage. She has been served by the Municipality with several notices calling on her to allow access for the purpose of removing night soil from Ba Shin's privy and she has categorically refused to do so. In her reply to one of the notices, dated the 11th of January, 1926, she said that the President of the Municipality and the Municipal Engineer had visited the place many times and had asked her to allow Ba Shin to use the passage and that she flatly refused the request and closed the passage to prevent access.

The President of the Municipality thereupon filed a complaint against her for disobedience of a notice in writing lawfully issued by the Municipality, and the case was sent to the Honorary Magistrates for trial. After taking evidence and themselves visiting the premises the Honorary Magistrates found the respondent guilty of an offence under s. 180 of the Municipal Act and fined her Rs. 10.

Respondent paid the fine but appealed against the conviction to the District Magistrate. The appeal was heard by the Additional District Magistrate who set aside the conviction and sentence on the strength of a ruling of the Chief Court in the case of *Ma Nyein* (Criminal Revision Case No. 1333 of 1906).

That ruling, not being officially reported, was not binding on the Magistrate, and I am of opinion that it was mistaken. The Honorary Magistrates followed the ruling of the Judicial Commissioner of Upper Burma in *Mapara* v. *Municipal Committee of Mandalay* (1) and in my opinion they were quite right in doing so. I entirely agree with every word of that ruling and I have no doubt that, as the learned Judicial Commissioner said, s. 121 of the Municipal Act "empowers the Committee to require an owner to allow the servants of the Committee reasonable access to or passage over his land for scavenging purposes, whether these purposes concern the land in question or other land" and that "the rights of residents of the Municipality are sufficiently protected by the provision that the access to or passage over the land must be reasonable."

I have read carefully through the Honorary Magistrates' record and I see no reason to believe that the access and passage, which the Municipality claimed, were unreasonable. It is clear that night soil was formerly removed without objection by the way which respondent has closed, and there is a presumption that that was and is the most convenient way of removing it. The trouble has arisen solely through respondent's unreasonable attitude, which is due merely to her quarrel with Ba Shin and not to any other change in circumstances. Considering the defiant position which respondent took up and the trouble which she caused I am surprised that the Honorary Magistrates did not inflict a heavier fine, but in view of the fact that the Local Government, which has directed this appeal to be brought, does not press for a heavy sentence, I will merely restore the fine which the Honorary Magistrates inflicted.

The order of the Additional District Magistrates acquitting the respondent and directing the refund of the fine is set aside, and the respondent is convicted of an offence under s. 180 of the Municipal Act and is fined Rs. 10, with seven days' simple imprisonment in default of payment.

The District Magistrate will take the necessary steps to enforce payment of the fine, which I notice has already been refunded to the respondent.

A. N. A. *Order accordingly.*

(1) U. B. R. (1897-1901), Vol. I, p. 230.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL TRANSFER APPLICATION No. 143 OF 1926.

October 8, 1926.

Present:—Mr. Tyabji, A. J. C.

SANWAL AND ANOTHER—APPLICANTS

versus

EMPEROR—OPPONENT.

Cr. P. C. (Act V of 1898), ss. 526 (4), 539, 539A—Penal Code (Act XLV of 1860), ss. 191, 193—Oaths Act (X of 1873), ss. 4, 14—Transfer application—Affidavit, false statement in, effect of.

A person making a false statement in an affidavit filed in support of an application for transfer of a criminal case as required by the provisions of s. 526 (4), Cr. P. C., is guilty of an offence under s. 191 of the Penal Code. [p. 342, col. 1.]

Abdul Majid v. *Krishna Lal Nag* (1), *Emperor* v. *Dital Sagar* (2) and *Allahwarayo* v. *Emperor* (3), distinguished.

Mr. *Rewachand Vasanmul*, for the Applicants.

Mr. *T. G. Elphinston*, Public Prosecutor, for the Opponent.

ORDER.—This matter comes before me on a notice issued by the learned Judicial Commissioner that "an enquiry should be made into what appears to be an offence referred to in s. 195, sub-s. (1), cl. (*b*), Cr. P. C., which appears to have been committed in an affidavit filed by Rupo son of Sajandas in respect of para. 4," the learned Judicial Commissioner, therefore, called upon the said Rupo to show cause why a complaint should not be made to a Magistrate to try the said offence.

The offence referred to is that of giving false evidence which is defined in s. 191 and rendered punishable under s. 193. Section 191 so far as relevant is as follows:

"Whoever, being legally bound by an oath...to state the truth...makes any statement which is false, and which he either knows or believes to be false or does not believe to be true, is said to give false evidence."

A person intentionally giving false evidence is punishable whether (1) the false evidence is given in any stage of a judicial proceeding or (2) "in any other case;" although in the latter case the maximum punishment is less than in the former s. 193.

It has, therefore, to be proved that false evidence has intentionally been given; and in order that the state of facts referred to as giving false evidence may arise, the person must be legally bound by an oath to state the truth, and must have failed to do so.

The false evidence is alleged in the present case to have been given by the said Rupo making an affidavit containing a statement, which he either knew or believed to be false, or did not believe to be true. The affidavit was made in support of an application for transfer of a case pending in one Criminal Court to another under s. 526 of the Cr. P. C.

It is argued that Rupo was not legally bound by an oath to state the truth: that there was no necessity for any affidavit being filed in the proceedings before the Court by Rupo, and that, therefore, it must be taken to have been a statement which the deponent was not legally bound to make. It seems to me that this argument is fallacious. A person may or may not be under a necessity to make any statement at all, and logically speaking he may or may not be legally bound (when he does make the statement whether voluntarily or involuntarily) to state the truth; though it is difficult to conceive a situation in which the law should bind a person to make a statement, and yet not bind him to state the truth. The present position, however, is one where the law did not bind Rupo to make any statement at all; and the question is, whether not being bound to make any statement, yet having voluntarily undertaken to make an affidavit, he voluntarily placed himself in such a position that he was by law bound to state the truth in the affidavit.

The duty to state the truth is laid down in s. 14 of the Oaths Act X of 1873. It arises when a person is giving evidence before any Court or person authorised by the said Act to administer oaths and affirmations. The question then is whether Rupo when he made the affidavit in question was giving evidence and if so whether he was giving evidence before any Court or person authorised to administer oaths and affirmations.

The effect of the law becomes clear on an examination of the authorities that were cited. In *Abdul Majid* v. *Krishna Lal Nag* (1) the Court held that the District Judge having made an order and instituted a proceeding which he was not by law authorised to make, he was not by law authorised

(1) 20 C. 724; 10 Ind. Dec. (N. S.) 489

to examine the applicant, nor to administer an oath. Moreover they held that the affidavit would not have been evidence in the proceeding. The proceeding being without authority in its origin and inception, and the form in which the evidence was purported to be taken (*viz.*, by affidavit) being unauthorized the oath was not administered by a person "in discharge of the duties, or in exercise of the powers imposed or conferred on him by law" (Oaths Act, s. 4). Hence no duty arose to state the truth.

Similarly in the case reported in *Emperor* v. *Dital Safar* (2) the statements were by persons who were not witnesses in any proceedings pending in any Court; and moreover the Magistrate was not authorised to administer the oath he purported to administer as there was no provision for evidence being taken on affidavit. In *Allahwarayo* v. *Emperor* (3) the Magistrate had no authority to hold such a proceeding as he purported to hold; and he was, therefore, not authorised to administer oaths under s. 14 of the Oaths Act.

In the present case the proceedings consisted of a Criminal Transfer Application made to this Court in its High Court jurisdiction, as to the regularity of which no question could be raised. That the person by whom the oath was administered was authorised to do so also admits of no doubt: Section 539 of the Cr. P. C., provides for swearing of affidavits to be used before any High Court before any Commissioner appointed by such Court. The further question whether in the course of such applications evidence may be given on affidavit is answered by s. 526 (4) of the Cr. P. C. which requires applications for transfer to be supported by affidavit or affirmation. Moreover, the facts alleged in the affidavit are that one of the applicants was sent for by the Magistrate, that "he was abused, his turban was pulled down and was spat on the face by" the Magistrate. These are certainly allegations coming under s. 539 A of the Cr. P. C., and, if so under that section also evidence of the facts alleged may be given by affidavit.

It seems to me, therefore, that the deponent was legally bound to state the truth and that there is no formal objection to the complaint being made to the Magistrate. A proper complaint must be drafted by the Public Prosecutor so that it may be filed before the proper Magistrate.

A. N. A. *Order accordingly.*

(2) 12 Ind. Cas. 651; 5 S. L. R. 102; 12 Cr. L. J. 563.

(3) 35 Ind. Cas. 672; 10 S. L. R. 61; 17 Cr. L. J. 368.

OUDH CHIEF COURT.

CRIMINAL APPEAL No. 421 OF 1926.

December 3, 1926.

Present:—Sir Louis Stuart, KT., Chief Judge, and Mr. Justice Raza.

RAJA RAM—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Cr. P. C. (Act V of 1898), s. 172 (2)—Police diary, proper use of.

A Court cannot use Police diaries as evidence in the case, but only to aid it in the inquiry or trial. The aid which a Court can receive from the entries in such a diary is usually confined to utilising the information given therein as a foundation for questions to be put to the witnesses and in using the diary the Court should always employ very great caution. [p. 343, col. 1.]

Appeal against an order of the Sessions Judge, Gonda, dated the 4th November, 1926.

Messrs. *J. Jackson* and *R. F. Bahadurji*, for the Appellant.

Mr. *G. H. Thomas*, Government Advocate, for the Crown.

JUDGMENT.—Raja Ram has been convicted by the learned Sessions Judge of Gonda of the offence of murder under s. 302 of the Indian Penal Code and sentenced to death subject to confirmation by this Court. He appeals. The reference in confirmation is also before us.

The facts present no difficulty. In the village of Dabawal, in the Gonda District, there resided a family of Dube Brahmans, who lived in a portion of the inhabited area very close to one another. The head of the family was a paralyzed old man called Ram Pargash. Ram Pargash had three sons living: Raj Man, Raj Narain, and Raja Ram the appellant. He had also a widowed daughter called Raj Kumari. He had two grandsons Udai Prasad and Pirthi who were sons of his deceased daughter Raj Dei. Udai Prasad is the man who has been killed. He had also a grandson Dukhharan, who was the son of a deceased son Ram Shankar There had been for some time a quarrel in the family in respect of the partition of the joint family

property; and it appears that Raj Narain and Dukhharan were particularly anxious to have their shares separated. They were opposed in this by Raja Ram appellant, Raj Man and the widow Raj Kumari. The members of the family appear to have been very turbulent. It is clear that on the 24th July, 1926, early in the morning, there was a disturbance in front of the house of Ram Pargash and it is clear that in this disturbance Udai Prasad was killed by a punctured wound from a spear, which entered at about his left nipple and penetrated his lungs. He died within some two hours of receiving the injury. The main evidence which connects the appellant Raja Ram with Udai Prasad's death is the evidence of members of the family. There is also other evidence. The learned Sessions Judge being satisfied that the appellant Raja Ram, was the man, who inflicted the wound which caused the death of Udai Prasad, has convicted him of murder and sentenced him to death. But the learned Sessions Judge has discarded much of the evidence against the appellant. We consider that the learned Sessions Judge has been unnecessarily cautious in his attitude towards this evidence. In a case such as this, in which there was undoubtedly something of the nature of a mutual fight between different members of the same family, exaggeration and mis statements are almost inevitable, but it is not necessary to attribut to witnesses a desire to deceive when they are doing little more than exaggerate after their nature. Further the learned Sessions Judge appears to us not to have grasped the exact significance of the provisions of s. 172 (2) of the Cr. P. C. He appears to have used the entries in the Police diary as though thay were evidence in the case to discredit the prosecution evidence. Section 172 (2) lays down very distinctly that the Court may not use such diaries as evidence in the case, but only to aid it in the inquiry or trial. The aid which a Court can receive from the entries in such a diary is usually confined to utilising the information given therein as a foundation for questions to be put to the witnesses, and in using the diary the Court should always employ very great caution. The comments of Sir John Edge in *Queen Empress* v. *Mannu* (1) are as valuable to-day as when they were made, although the law on the subject has been slightly modified since the decision of the Full Bench which decided that case. Even when it is permissible to utilise the record of statements made by a Police Officer in the course of an investigation and entered in the diary the Courts should remember the principles laid down in a previous decision of the Allahabad High Court in *Queen Empress* v. *Nasir-ud-Din* (2) which was quoted with approval by Sir John Edge. In *Queen Empress* v. *Nasir-ud-Din* (2) the Bench which decided the case said in reference to the statements recorded by the Police during an investigation: "Such statements are recorded by Police Officers in the most haphazard manner. Officers conducting an investigation not unnaturally record what seems in their opinion material to the case at that stage and omit many matters equally material, and, it may be, of supreme importance as the case developes. Besides that, in most cases they are not experts of what is and what is not evidence. The statements are recorded often hurriedly in the midst of a crowd and confusion, subject to frequent interruption and suggestions from bystanders." We, therefore, consider that the learned Session Judge has discounted the case for the prosecution too greatly. This makes his conclusion all the stronger when he finds that upon the evidence which he does accept, the case for conviction is made out. We agree with him in finding Mata Din and Pirthi absolutely reliable witnesses We would note that the learned Sessions udge in his English note of the evidenc does not appear to have recorded exactly the meaning of the vernacular statement at the latter end of that deposition which we would place upon it. We translate the words of Mata Din's deposition recorded as the deposition "To Court".

"Dukhharan Nath, Raja Ram etc., have been quarrelling for the last year over their shares as between uncles and nephews. Udai Prasad sided with Dukharan Nath and Raj Narain. For this reason he has killed. On the day that the occurrence took place mutual abuse had been going on since dawn. Dukhharan and Raj Narain wanted to separate, and these people "(the accused)" were on the other side. I did not go at the time of the *punchayet*. Raj

(1) 19 A. 390; A. W. N. (1897) 174; 9 Ind. Dec. (N. S.) 254.

(2) 16 A. 207; A. W. N. (1894) 57; 8 Ind. Dec. (N. S.) 133.

Narain and Dukhharan wanted the Rs. 200 due to them and to separate from the rest. When I went to my field at dawn, then there was talk about the share going on at the door of Ram Pargash and Udai Prasad also was present. I did not see that he had any *lathi*. Raj Narain had a *lathi*. I did not see Pirthi with a *lathi*."

As this passage is given by the learned Sessions Judge (there was an additional difficulty in the fact that between the words "that" and "Pirthi" at the 38th line the printer had erroneously inserted a full stop) it appeared at first sight that Mata Din had stated in contradiction to Pirthi that Pirthi had been at the spot at dawn, and that Pirthi had a *lathi* whereas Pirthi had stated in his deposition that he was not at the spot at dawn and that he had no *lathi*, but on a correct translation of this passage it is seen that there is no discrepancy between the two statements.

On the evidence of these two witnesses alone it is clear that when they arrived on the scene they found Udai Prasad prostrate on the ground and Raja Ram the appellant with a spear in his hand. It is proved beyond the possibility of doubt that the injuries to the effects of which Udai Prasad succumbed were inflicted by a spear, and although there were *lathis* being used by other persons, including the woman Raj Kumari (who, upon the evidence, is as powerful as a man and as ferocious) the only person who had a spear was the appellant. In these circumstances we have no doubt as to the fact that the appellant killed Udai Prasad with a spear thrust. From the evidence in the case it is clear to us that he had no right to private defence and that he deliberately ran the deceased man through the body. It would appear that the deceased's party were not the aggressors in the matter. Raj Narain, it is true, defended himself with a *lathi*, but all the severe injuries were inflicted upon the party of the deceased. Udai Prasad was killed. Mata Din was so severely thrashed that he remained in hospital for a fortnight and Raj Narain was also injured severely. We accordingly find that the appellant has been rightly convicted of murder. We agree with the learned Sessions Judge with regard to the necessity of avoiding undue leniency in a district such as Gonda where the crime of homicide is so frequent. We, therefore, dismiss the appeal, confirm the conviction and sentence and direct that Raja Ram be hanged by the neck till he be dead.

A. N. A. *Appeal dismissed.*
Sentence confirmed.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 364 OF 1925.

June 1, 1926.

Present:—Mr. Justice Broadway.

GHULAM MUHAMMAD—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 71, 366, 376—Kidnapping and rape—Separate sentences, legality of.

Where an accused is convicted under ss. 366 and 376, Penal Code, it is not illegal to pass separate sentences for each of the offences inasmuch as the offences are separate and the charge under s. 366 involves elements and questions of fact different from a charge under s. 376. [p. 345, col. 1.]

Labh Singh v. *Emperor* (1) and *Emperor* v. *Sakharam Ganu* (2), relied on.

Appeal from an order of the District Magistrate, Attock at Campbellpur, dated the 20th March, 1926.

FACTS.—One Ghulam Muhammad, son of *Subedar* Dost Muhammad Khan, was tried along with three others on charges under ss 366 and 376, Indian Penal Code, for having kidnapped and raped *Musammat* Lal Devi, a married girl of 13 years of age. Ghulam Muhammad was convicted under both the sections, his companions being discharged. He was sentenced to seven years' rigorous imprisonment under 366 and four years' rigorous imprisonment under 376, Indian Penal Code, the sentences to run consecutively.

Mr. *Sleem*, for the Appellant.

Mr. *Ram Lal*, Assistant Legal Remembrancer, for the Respondent.

JUDGMENT.

Broadway, J.—[After stating the facts his Lordship proceeded as follows:—]

It was next urged by Mr. Sleem that although the District Magistrate was legally entitled to convict the appellant under ss. 366 and 376, Indian Penal Code, he acted illegally, and against the provisions of s. 71, Indian Penal Code, in passing separate sentences. He also urged that the sentences passed were excessive. As to the latter point I am of opinion that the sentences are by no means excessive. On the former question Mr. Sleem urged that inasmuch

as the offence under s. 366 contemplates kidnapping or abduction with the intention of subjecting, the person abducted to illicit intercourse, the commission of illicit intercourse must be regarded as a part of the same transaction, and, therefore, for purposes of punishment must be treated as one offence. On the other hand Mr. Ram Lal referred to the case of *Labh Singh* v. *Emperor* (1) a decision of Moti Sagar, J., in which it was held that the offences under ss. 458 and 376 were separately punishable. After careful consideration it seems to me that the offence of kidnapping was complete as soon as the girl had been carried away. That the offences are separate was pointed out in the case of *Emperor* v. *Sakharam Ganu* (2) where it was held that it was not competent to a Judge in appeal to alter a charge under s. 376 to one under s. 366, Indian Penal Code, because a charge under this section involves different elements and different questions of fact from a charge under 376. It appears to me that Ghulam Muhammad had brought himself within the purview of s. 366 the moment he forcibly carried away *Musammat* Lal Devi with the intention provided by that section, and he has, therefore, rightly been convicted and sentenced under s. 366, Indian Penal Code.

As to the question of rape it has been strenuously urged by Mr. Sleem that the evidence in support of this charge consists only of the girl's statement unsupported by any medical evidence or by any other direct testimony. Now, the story told by the girl is a straightforward one. She says that she was taken from the pond to the house of a barber and locked into a room with the appellant, that he threatened her with death closed her mouth and after the search party had been sent away by the barber, she was undressed by the appellant and subjected to sexual intercourse. She then goes on to say that she was taken at night to another *dhok* and placed with the appellant in another house, and there the appellant again undressed her and himself and on four separate occasions subjected her to sexual intercourse. Mr. Sleem has urged that on this point her evidence should not be accepted inasmuch as she had denied to the Inspector that any rape had been committed. Her denial in the circumstances is not surprising. She is a high caste Hindu girl, recently married, of good position and to admit that she had been raped would involve her in very serious consequences. The statement of the Deputy Superintendent of Police is perfectly clear and is to the effect that she did definitely state that she had been raped when she appeared before him at Basal on the 28th October, and he ascribes her later denial of the fact to the circumstance that her relatives expressed their unwillingness to press this charge of rape. In this aspect of the case the Deputy Superintendent of Police has shown himsalf grossly ignorant of the law and to my mind incompetent as a controlling investigating officer. How far his action was influenced by the position of the appellant's father it is impossible to say. But after giving careful consideration to the evidence of the girl I find it impossible to take a view different from that taken by the learned District Magistrate, and must, therefore, hold that *Musammat* Lal Devi's statement that she was raped by the appellant is correct.

The offence is a very serious one and I must, therefore, dismiss the appeal.

A. N. A. *Appeal dismissed.*

(1) 75 Ind. Cas. 77; A. I. R. 1923 Lah. 291; 24 Cr. L. J. 877; 6 L. L. J. 111.

(2) 8 Bom. L. R. 120; 3 Cr. L. J. 240.

OUDH CHIEF COURT.

CRIMINAL REFERENCE No. 57 OF 1926.

November 4, 1926.

Present:—Sir Louis Stuart, KT., Chief Judge.

EMPEROR—APPELLANT

versus

JAGANNATH AND OTHERS—ACCUSED—RESPONDENTS.

Cr. P. C. (Act V of 1898), s. 215—Prosecution allegations, if proved, not constituting offence—Quashing of commitment—Minor—Marriage without consent of guardian, whether void.

A commitment can be quashed under s. 215, Cr. P. C., where the allegations of the prosecution, if proved, would not constitute an offence in law. [p. 346, col. 1.]

The want of consent of the guardian does not render the marriage of a minor void. [p. 346, col. 1.]

Case reported by the Sessions Judge, Lucknow, dated the 14th September, 1925.

FACTS.—The seven accused have been committed for trial, Kesho and Jagannath under s. 496, and the remaining 5 under s. 496/109, Indian Penal Code. The charge is preferred in respect of the marriage of

the accused Kesho and Jagannath, who are adult males, and brothers, to two sisters *Musammat* Sumitra aged 14, and *Musammat* Sundar aged 9.

The brother Munnoo of the accused is already married to a sister *Musammat* Kunwaria of the two little brides. The accused with their father Sheodarshan and a younger brother Putti live at a village Deorhi Gadha, ten miles from Purabgaon, the village where the brides reside with their father Durga Prasad and their younger brother Debi Dayal aged 8.

The sacred thread ceremony of the accused's younger brother Putti being appointed to be performed at Deorhi Gadha, Kesho went to Purabgaon to obtain the attendance thereat of the married girl Kunwaria. Interviewing Durga Prasad her father he suggested that her sisters Sumitra and Sundar and his brother Devi Dayal should also witness the ceremony. At first Durga Prasad denounced, but he finally yielded, and all his four children accompanied the accused.

After the sacred thread ceremony one of the other accused Fateh Bahadur seems to have suggested that the families of Sheodarshan and Durga Prasad should be yet more closely united by marrying the two accused Kesho and Jagannath already mentioned, brothers of Munnoo, to Sumitra and Sundar sisters of Munnoo's wife. Eventually this suggestion was carried out, the marriages taking place to the accompaniment of all the ceremonies necessary to make them valid.

It is the case of the prosecution, however, that the marriages are wholly void on the ground that as was indeed the case the consent of Durga Prasad was not obtained to them. That is the ground on which the accused have been committed for trial that they knew that although all the ceremonies necessary to constitute a valid marriage were gone through, the marriages were invalid and void because the complainants' consent was not attained to them.

There is, no doubt, the authorities cited by both sides are unanimous on the point, that want of consent of a guardian does not render a marriage void but only voidable. On the ground, therefore, on which they have been committed for trial, there is no case against the accused and their trial could necessarily be abortive, and only conduce to no purpose for the time and money.

The learned Government Pleader would save the charge under s. 496 by setting up a case that the brides were not willing to be married to the accused, and had to be forced, by taking them in the arms to do so. Something of the sort, no doubt, appears in the evidence, but, it is clear from the commitment order that the learned Magistrate who heard the evidence placed no reliance upon these allegations. He does not trouble to discuss the matter, basing objection to the marriages solely on the ground of their being without the guardian's consent.

The learned Government Pleader further suggests that the case might be saved by adding charges under s. 366, Indian Penal Code. Such charges were indeed, propounded in the Court below, but the learned Magistrate declined to commit upon them, giving in his commitment order what appears to me to be conclusive reasons for holding that the offence of kidnapping was not committed.

There appears to me, therefore, to be no grounds upon which the accused can legally be called upon to stand their trial and I would report the case to the Chief Court with the recommendation that the commitment be quashed. It will, however, first be referred to the learned Magistrate for any remarks which he may wish to submit.

Mr. *H. K. Ghose*, Government Pleader, for the Appellant.

Dr. *J. N. Misra*, for the Accused.

JUDGMENT.—I consider that, in all the circumstances of the case, the prosecution will serve no useful purpose. I quash the commitment upon the point of law under s. 215, Cr. P. C., on the ground that if the allegations for the prosecution were proved by the evidence they are not sufficient to constitute an offence.

A. N. A. *Commitment quashed.*

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 254 OF 1926.
(CRIMINAL REVISION PETITION No. 231 OF 1926.)

September 10, 1926.

Present:—Mr. Justice Jackson.

NAGOOR KANNI NADURA—
COMPLAINANT—PETITIONER
versus
SITHU NAICK AND OTHERS—ACCUSED Nos. 1 TO 3—RESPONDENTS.

Cr. P. C. Act (V of 1898), ss. 264, 439—Appellate

Court, whether can call for notes of evidence in cases tried summarily.

An Appellate Court, in order to test the substance of the evidence forming part of the judgment in a summary case under s. 264, Cr. P. C., cannot call for such material as may exist outside the record, such as notes of evidence taken by the trial Magistrate inasmuch as under s. 264 the judgment shall be the only record in such cases.

Petition, under ss. 435 and 439 of the Cr. P. C., 1898, praying the High Court to revise the order of the Court of the Sub-Divisional First Class Magistrate, Koilpatti, in Criminal Appeal No. 57 of 1925, preferred against the order of the Court of the Second Class Bench of Magistrates, Sankaranainarkoil, in Bench Case No. 164 of 1925.

Dr. *S. Swaminathan*, for the Petitioner.

Mr. *S. Ramasami Iyer*, for the Accused.

ORDER.—This case is not of much actual importance, and this Court will not ordinarily interfere to set aside acquittals in petty assaults. But it raises a point of law of some interest. Can an Appellate Court in order to test the substance of the evidence forming part of the judgment in a case under s 264, Cr. P. C., call for such material as may exist outside the record, such as notes of evidence taken by the Presidency Magistrate as in the present case? Considering that s. 264, Cr. P. C., clearly lays down that the judgment shall be the only record in such cases, it must be held that such additional matter cannot be called for or consulted. The Appellate Court, therefore, has based its decision upon irrrelevant matter; but in the present case, there is no reason to interfere.

The petition is dismissed.

V. N. V. *Petition dismissed.*

RANGOON HIGH COURT.

CRIMINAL APPEAL No. 988 OF 1926.

September 3, 1926.

Present:—Justice Sir Benjamin Herbert Heald, KT.

MAUNG SEIN—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 499—Defamation—Newspaper, whether 'a person'—Defamation of newspaper, whether criminal offence.

A newspaper is not a person and the defamation of a newspaper, therefore, is not a criminal offence where it does not involve the defamation of any individual concerned with the paper. [p. 347, col. 1.]

Criminal appeal against an order of the Eastern Sub-Divisional Magistrate, Rangoon, in Criminal Regular Trial No. 136 of 1926.

JUDGMENT.—Maung Gyi, the proprietor of a newspaper called the *New Light of Burma*, prosecuted Maung Sein, the Editor of a magazine known as "Bandoola," for defaming the *New Light of Burma* by saying that U Ba Pe, who is a Member of the Legislative Council and Managing Director of the Sun Press, had lent Rs. 6,000 to the *Light of Burma* and was "leading that paper by the nose."

Both in his complaint and in his evidence Maung Gyi represented the paper and not himself as having been defamed. In his complaint he said that Maung Sein "published the said imputations with intent to harm or knowing or having reason to believe that they would harm and directly lower the reputation of the *New Light of Burma* in the estimation of the reading public." In his evidence he said: "The article in question was published so as to dishonour the reputation of my paper. By dishonouring the reputation of my paper, the circulation of the paper would become less and the business reputation of my paper would be lowered."

The Magistrate in his judgment said that the complainant's case was that the remarks conveyed the meaning that because the *Light of Burma* had borrowed Rs. 6,000 from U Ba Pe that paper was altogether under U Ba Pe's thumb. He went on to say: "The complaint is for casting that imputation on complainant's paper and not on himself."

The parties and their legal advisers and the Magistrate himself seem to have overlooked the fact that a newspaper is not a person, and that, therefore, it is not a criminal offence to defame a newspaper. Defamation of a newspaper may in certain cases involve defamation of those responsible for its publication. It might, for instance, amount to defamation of the person responsible for a newspaper to say that its policy was influenced or dictated by a particular person, if that person was disreputable, but I do not understand it to be suggested by either side that U Ba Pe is a disreputable person. It might amount to defamation to say that a man was in debt, but that is not the defamation complained of in this case. The complainant admits that he bought the paper with bor-

rowed money, and, so far as the suggestion that he had borrowed money from U Ba Pe is concerned, it is admitted that he had borrowed money from U Ba Pe's mother-in-law, who was apparently living with U Ba Pe.

A great deal of time, and, doubtless, a considerable amount of money, has been wasted over this prosecution, but it seems to me that the case is one to which the provisions of s. 95 of the Indian Penal Code may well be applied, since the harm done was so slight that no person of ordinary sense and temper would complain of it.

I, therefore, set aside the conviction and sentence and direct that the accused be acquitted so far as this case is concerned.

The fine of Rs. 51 which has been paid will be refunded.

A. N. A. *Conviction set aside.*

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 659 OF 1926.

October 23, 1926.

Present:—Mr. Justice Ashworth.

NAUBAT AND OTHERS—ACCUSED—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Cr. P. C. (Act V of 1898), ss. 202, 266—Summary trial—Discretion of Magistrate—Large number of accused, summary trial, whether improper—Police report—Magistrate's power to take report into consideration in directing summary trial.

A Magistrate is entitled after taking cognisance of a complaint to order a Police investigation and to take that investigation into consideration when considering under what sections the accused should be put on their trial. [p. 348, col. 2.]

The mere fact of there being a large number of accused does not appear to me to be a conclusive reason against trying a case in the summary method. [*ibid.*]

There is nothing improper in a Magistrate being influenced by the Police report in directing a summary trial. [p. 349, col. 1.]

Criminal reference made by the Sessions Judge, Ghazipur, dated the 18th of September, 1926.

Mr. *A. P. Pandey*, for the Applicants.

JUDGMENT.—This is a reference by the Sessions Judge of Ghazipur recommending that an order passed by a First Class Magistrate for the summary trial of 31 accused should be set aside. A complaint was lodged against 31 accused alleging facts, which if believed, would indicate that offences under ss. 147 and 427, Indian Penal Code had been committed by them. This complaint was filed before one Magistrate. The Magistrate took congnizance of the offences alleged under s. 190 (*a*) of the Cr. P. C, that is to say, he took cognizance on a complaint. He then under s. 202 directed an investigation by the Police. The Police expressed the opinion that the facts justified the accused being put on their trial under ss. 143 and 427 of the Indian Penal Code, and that it was a case where the summary method of trial might be employed. The Magistrate appears to have accepted the Police report and the case was transferred by the District Magistrate for a summary trial to another Magistrate. The accused thereupon made an application that the case could not be tried summarily which was rejected by the second Magistrate by order dated 26th August, 1926. In this order the Magistrate has stated that "no doubt there is a large number of accused, but the sections are such that they can be tried summarily. In case I convict the accused and also bind them over under s. 106 the order becomes appealable." Then, there is a reference to s. 107 which is not understood. The Sessions Judge is of opinion that the rejection of the application of the accused against the trial being heard summarily was improper on the grounds (*a*) that the complaint, if true, would indicate offences under ss. 147 and 427; (*b*) that there were a large number of accused; (*c*) that there would be no appeal in case a non-appealable sentence was passed.

It may be added that in the application of the accused against the trial being heard summarily, it is stated that no order under s. 106 could be passed upon conviction of an offence under s. 143 or 427 which appears to be correct.

No sufficient ground appears to me for interference in revision. A Magistrate is entitled after taking cognizance of a complaint to order a Police investigation and to take that investigation into consideration when considering under what sections the accused should be put on their trial, otherwise there would appear to be no reason for the Legislature allowing the Court to order investigation by the Police unders. 202.

As to the facts of there being a large number of accused persons, s. 266 of the Cr. P. C., gives a discretion to a Magistrate to try summarily certain offences if he thinks fit. The mere fact of there being a large number of accused does not appear to me to be a conclusive reason against trying a case in the summary method.

As to the remark of the Sessions Judge

that there would be no appeal if the accused were convicted, the law appears to desire that in certain cases there should be no appeal, and no sufficient reason appears why in this case an opportunity for appeal is essential. The remark of the Assistant Magistrate that an appeal would lie if he bound the accused under s. 106 may be ignored as he could not so bind them. But if there is no order under s. 106 the accused have no reason to complain. The Sessions Judge has mentioned certain rulings which appear to amount to this that in considering the section of the Indian Penal Code under which accused persons should be tried, the Court should take into account the facts alleged in the complaint on the basis of which cognizance of the case is taken. This does not mean that a Court is bound to put a person on his trial under a section which the Court does not believe applicable to those facts which there is a reasonable chance of being proved.

The Magistrate appears to have been influenced by the Police report in directing a summary trial and I find nothing improper in this. He does not appear to have been prompted by any improper desire to prevent an appeal.

For the above reasons I see no reason for interference and order that the record be returned.

A. N. A. *Reference rejected.*

RANGOON HIGH COURT.

CRIMINAL REVISION No. 1151-B OF 1926.

September 3, 1926.

Present:—Justice Sir Benjamin Herbert Heald, KT.

NGA PA—ACCUSED—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Burma Habitual Offenders' Restriction Act (II of 1919), ss. 3, 7—Burma Excise Act (V of 1917), s. 64A—Restriction of persons against whom action under s. 64A may be taken, legality of.

The fact that proceedings under s. 64A of the Burma Excise Act may be taken against an accused does not warrant a Magistrate in taking proceedings against him under s. 3 of the Burma Habitual Offenders' Restriction Act or in making an order under s. 7 of that Act.

Emperor v. *Nga Kyaw Hla* (1), applied.

Criminal revision against an order of the Sub Divisional Magistrate, Moulmein, in Criminal Miscellaneous No. 221 of 1926.

JUDGMENT.—Nga Pa was sent up by the Excise Department before the Sub-Divisional Magistrate of Moulmein with a view to his being put on security under the provisions of s. 64A of the Burma Excise Act. Instead of taking the action which he was asked to take the Magistrate purported to take action under s. 7 of the Burma Habitual Offenders' Restriction Act. It has been held by a Bench of this Court in the case of *Emperor* v. *Nga Kyaw Hla* (1) that the cases referred to in s. 3 (1) of the Habitual Offenders' Restriction Act do not include cases in which a Magistrate may require a person to show cause why he should not be ordered to execute a bond for his good behaviour under s. 3 of the Burma Opium Law Amendment Act. The provisions of s. 64A of the Burma Excise Act are exactly similar to those of s. 3 of the Burma Opium Law Amendment Act, and it follows that the fact that proceedings under s. 64A of the Excise Act may be taken against the accused does not warrant a Magistrate in taking proceedings against him under s. 3 of the Restriction Act or in making an order under s. 7 of that Act

The order of restriction against Nga Pa is set aside and the case is remanded to the Sub-Divisional Magistrate for re-trial according to law.

A. N. A. *Order set aside.*

(1) 98 Ind. Cas. 714; 4 R. 123; A. I. R. 1926 Rang. 182; 5 Bur. L. J. 78; 27 Cr. L. J. 1402.

CALCUTTA HIGH COURT.

CRIMINAL REFERENCE No. 214 OF 1926

AND

CRIMINAL REVISION No. 846 OF 1926.

August 25, 1926.

Present:—Justice Sir George Claus Rankin, KT., and Mr. Justice Duval.

EMPEROR—PROSECUTOR

versus

MONMOTHA NATH MITER AND OTHERS—ACCUSED.

Cr. P. C. (Act V of 1898), ss. 215, 282—Illness of Juror—Discharge of Jury—Judge, discretion of—Interference of discretion—Discharge of Jurors—Re-summoning, propriety of—Commitment—Withdrawal of graver charges—Remaining charges triable by Magistrate—Order of commitment, whether may be set aside.

Where there has been a commitment for the trial of charges some of which are triable by a Sessions Court with a Jury and others triable by a Magistrate, the fact that during the trial, the charges which were triable by the Sessions Court are withdrawn is not a ground for setting aside the order of commitment and taking away the accused's right to a trial by Jury, without his consent. [p. 351, col. 2.]

Where a Juror is prevented from attending throughout a trial by illness the Judge has, under s. 282, Cr. P

C., a discretion either to postpone the trial to a date on which the Juror would be able to attend or to discharge the Jury or to have another Juror. [p. 351, col. 1.]

If a Juror is going to be able to attend in a very short time it is a wrong exercise of disoretion to discharge the Jury. [p. 351, cols. 1 & 2.]

It is improper and inconvenient for persons to be re-summoned who have been released from their oath as Jurors by an order of discharge, and who, therefore, have been perfectly entitled in the *interim* to discuss the matter either with the accused or other persons. [p. 352, col. 1.]

Reference under s. 438, Cr. P. C. made by the Fifth Additional Sessions Judge, 24-Pergannahs, dated the 16th August, 1926, recommending that the order of commitment made by the Police Magistrate, Sealdah, dated the 18th June, 1926, may be set aside.

Rule against the order of the Fifth Additional Sessions Judge of the 24-Pergannahs, dated the 16th August 1926.

LETTER OF REFERENCE.

The seven accused were committed for trial before the Court of Session by the Police Magistrate of Sealdah. All the seven were charged with offences punishable under s. 147 and s. 302/149, Indian Penal Code. In addition three of them were also charged under ss. 326, 325 and 323, Indian Penal Code, respectively.

The Sessions trial commenced on 4th August, 1926, before a Jury of nine. The examination of eleven witnesses was concluded and the cross-examination of the 12th witness was in progress when the illness of a Juror interrupted the trial on 10th August, 1926.

On 11th August, 1926, a medical certificate was filed by the sick Juror and the case adjourned till 16th August, 1926. On 16th August, 1926, this Juror returned but another Juror was absent and on his behalf a medical certificate was filed that he had been ordered absolute rest for 10 days.

Under these circumstances the Jury was discharged under s. 282, Cr. P. C.

On the discharge of the Jury the Public Prosecutor filed a petition asking for leave to withdraw the charges under s. 302/149, Indian Penal Code. The Court, considering that there was no evidence at all to put before the Jury in respect of these charges, allowed them to be withdrawn. The accused were accordingly all acquitted under s. 494, Cr. P. C., of the charges under s. 302/149, Indian Penal Code.

The position now is that there must be a "*de novo*" trial as the Jury has been discharged. The only charges now standing against the accused are a charge under s. 147, Indian Penal Code, against all of them, and charges under ss. 323, 325 and 326 against three. Charges under ss. 147 and 323 are triable by any Magistrate: under s. 325 by Magistrates of the First and Second Classes: under s. 326 by Magistrates of the First Class.

Under the circumstances I do not consider it feasible to a fresh Jury to begin the case of accused in a Sessions Court on the remaining charges, which are within the competence of a Magistrate of the First Class.

Accordingly I recommend that the order of the Police Magistrate committing the accused to the Court of Session for trial be set aside and the case sent to the Police Magistrate or some other Magistrate for disposal.

The ground on which the recommendation is based is that the charges under s. 302/149 have been withdrawn and a judgment of acquittal recorded in respect thereof. The remaining charges do not entail a trial by a Court of Session.

Mr. *N. C Sen*, Babus *Probodh Chandra Chatterjee*, *Rabindra Nath Ghose* and *Bireshwar Chatterjee*, for the Accused in Reference.

Messrs. *Langford James*, *A. C. Mukerjee*, Babus *Probodh Ch. Chatterjee*, *Rabindra Nath Ghose*, *Kiran Kumar Bhuttacharji*, *Bireshwar Chatterji* and *Indu Bhusan Ghose*, for the Accused in Revision.

Messrs. *B. L. Mitter* (Advocate-General), *Khundkar* and Babu *Nagendra Nath Banerjee*, for the Crown.

JUDGMENT.

Rankin, J.—There are two matters before us. One is a Reference by the learned Fifth Additional Sessions Judge of the 24-Pergannahs. It appears that the learned Judge was trying a case in which all the seven accused were charged under s. 147 and also under s. 302 read with s. 149 of the Indian Penal Code; but, in addition, three of them were also charged under ss. 326, 325 and 323.

The case had been committed for trial. I may say at once that it does not appear to me that there was any illegality about the order of commitment. The Committing Magistrate in his order has quite properly dealt with the question whether the accus-

ed should be committed for trial on a charge under s. 302 read with s. 149. In these circumstances his order of committal was perfectly good.

The case began on the 4th of August and it was tried an the 4th, 5th, 6th, 7th and the 9th of August. Then, on the 10th a Juror fell ill. On the 11th he was absent and the case was adjourned to the 16th. As a matter of fact, on the 16th this particular Juror was present, but another Juror was ill and sent a medical certificate. Apparently by the medical certificate, if carefully scrutinised, it would have been discovered that another four days' time might have sufficed to get that Juror's attendance. However, the learned Judge, after discussing the question, whether to fix the case for the 13th of September or a subsequent day, finally made up his mind to discharge the Jury and he discharged the Jury. Having discharged the Jury the next step that took place before him was that the prosecution appeared before him and withdrew the charges under s. 302 read with s. 149 against all the accused. Those charges having been got rid of, the learned Judge has referred the matter to this Court for an order that the remaining charges, *i. e.*, to say, of rioting and hurt against the accused should be sent to be tried before a Magistrate; in other words, that the order of committal to the Sessions Court should be set aside.

Taking these matters in their chronological order, the first thing to be decided is whether or not the order discharging the Jury was a good order. In my opinion, it was a perfectly good order. If one looks at s. 282 which deals with this matter, it says this:—"If any Juror, from any sufficient cause, is prevented from attending throughout the trial ....." Whether a Juror is prevented from attending throughout the trial depends, among other things, on the days during which the trial is going to take place. In this particular case the question was whether or not an adjournment should be given for a certain length of time. No adjournment was given, so the Juror who was ill was prevented from attending throughout the trial. However, much the language of s. 282 may be scrutinized, it is abundantly evident that in such a case there is a discretion in the learned Judge whether to postpone the trial to a date on which the Juror should be able to attend or to discharge the Jury or have another Juror. If a Juror is going to be able to attend in a very short time, it is a wrong exercise of discretion to discharge the Jury. In this particular case, taking one thing with another, the learned Judge thought that he was not likely to be able to get on with this case until the lapse of a good many more days; and, taking the circumstances as a whole, he elected to discharge the Jury. In view of the fact that a good deal of evidence had been taken before the Jury it may be that he exercised his discretion in a manner which was a little hard upon the accused. It may be that some day early in September, if it could have been managed, would have been quite a suitable day for going on with the trial; but the learned Judge did not think so. The result is that the order in this case discharging the Jury is one with which it would, in my opinion, be quite improper for us to interfere.

Then the question whether since the charges under s. 302 read with s. 149 have gone, this Court should make an order that the remaining part of the case should be tried before a Magistrate and should set aside the commitment. On that I am very clear indeed that such an order would be entirely wrong. I will not here discuss the question whether the power of reference given by the Code embraces this particular reference which has been made; but dealing with the merits of the matter it does seem to me that after the accused have been committed to the Sessions—a perfectly good commitment—the fact that graver charges have been withdrawn is no reason at all why the commitment order should be set aside and the accused's right to a trial by Jury should be taken away from them without their consent. In my judgment it would be wholly wrong to do anything of that sort, and the correct course is that this case must go back for trial in the ordinary course as regards the remaining charges by the Sessions Judge and a Jury.

As it is desirable to give a ruling on the matter, we think it right to say that as the accused persons by their Counsel appear to desire that they should have a Jury of the same member as the Jury by whom they were being previously tried, we give a direction that in this case the re-trial shall take place before a Jury of nine persons.

With reference to the question, whether,

had we thought that the discharge of the Jury was illegal, we would have ordered a re summoning of the old Jury, I only desire to say for myself that it would require very strong circumstances indeed to make me give an order for the re-summoning of a Jury that have been at large since the 16th of August. Taking one thing with another, it would require some little further time before the case possibly could be re-started and I quite agree with the learned Advocate-General that it would be improper and inconvenient for persons to be re-summoned who have been released from their oath as Jurors by an order of discharge and who, therefore, have been perfectly entitled in the *interim* to discuss the matter either with their friends or with the accused or with anybody they like. Such an order as that, I hope, will never be made by this Court except in very exceptional circumstances.

For these reasons, the Reference of the learned Sessions Judge will not be accepted and for the same reasons the Rule which was granted at the instance of the accused persons will be discharged subject to the order which we have made as regards the Jury of nine persons.

Let the record be sent down at once.

Duval, J.—I agree.

A. N. A. *Reference rejected; Rule discharged.*

OUDH CHIEF COURT.

CRIMINAL REFERENCE No. 62 OF 1926.

December 3, 1926.

Present:—Sir Louis Stuart, KT., Chief Judge, and Mr. Justice Raza.

EMPEROR—COMPLAINANT—APPLICANT

versus

RAMANUJ AND OTHERS—ACCUSED—OPPOSITE PARTY.

Cr. P. C. (Act V of 1898), s. 106—Security proceedings—Conviction for causing hurt—Security, whether can be ordered.

The words "assault or other offences involving a breach of the peace" in s. 106, Cr. P. C., clearly include the offence of causing hurt under s. 323, Penal Code, and a person convicted of the latter offence can be ordered to find security to keep the peace under s. 106, Cr. P. C.

Dubri v. *Emperor* (1), dissented from.

Case reported by the Sessions Judge, Gonda.

Mr. *H. K. Ghose*, Government Advocate, for the Crown.

Mr. *K. P. Misra*, for the Accused.

JUDGMENT.—The learned Sessions Judge having inadvertently passed in revision an order, which he was not competent to pass which had the effect of enhancing a sentence, has requested us to use the power which we possess to make the enhancement. After hearing Counsel on both sides we propose to accede to some extent to his request. In this case three men have been convicted under s. 323 of causing hurt with *lathis*. In our opinion the provisions of s. 106 of the Cr. P. C. can be applied and they can be ordered to find security to keep the peace. In so far as a different opinion was taken in the case of *Dubri* v. *Emperor* (1) we regret our inability to agree with that opinion. We consider that the words "assault or other offences involving a breach of the peace" clearly include the offence of causing hurt under s. 323 and in the circumstances of the case we consider that these persons should be ordered to find security, though we do not think that the amount of the security should be as great as that suggested by the learned Sessions Judge. We call on each of these persons under the provisions of s. 106 to find security each in his own recognizances for Rs. 100 and each with one surety of Rs. 50 to keep the peace for one year. The sureties shall be persons who are considered as satisfactory sureties by the Sub Divisional Magistrate exercising jurisdiction in the place where the offence was committed.

G. H. *Order accordingly.*

(1) 71 Ind. Cas. 691; 8 O. L. J. 318; 24 Cr. L. J. 227.

ALLAHABAD HIGH COURT.

ORIGINAL SUIT No. 1 OF 1925.

June 7, 1926.

Present :—Sir Grimwood Mears, KT., Chief Justice, and Mr. Justice Mukerji.

THE SWADESHI MILLS Co., LTD., BOMBAY—PLAINTIFFS—APPELLANTS

versus

JUGGI LAL, KAMLAPAT COTTON, SPINNING, AND WEAVING MILLS, Co., LTD, CAWNPORE—DEFENDANTS—RESPONDENTS.

Trade mark—Mode of acquisition of right to trade mark in India—User—Passing off—Infringement of trade mark, what constitutes—Similarity, tests of—Evidence as to similarity—Colourable variation, what amounts to—Precedents, value of—Damages for infringement, measure of.

No man has a right to pass off his goods, by adoption of similar devices, as the goods of another. [p. 361, col. 2.]

In a country like India, where there is no Statute for registering trade marks, a right to a trade mark is acquired by user. [p. 361, col. 2.]

Similarity of designs is a matter for the Court to decide and opinion of witnesses on the point cannot be admitted in evidence. [p. 358, col. 2.]

Payton & Co., Ltd. v. *Snelling, Lampard & Co., Ltd.* (1), relied on.

Every case of passing off must be decided on its own circumstances and no decision can be more than a guide as to the general principles to be applied. [p. 364, col. 1.]

No general rule can be laid down as to what is or is not a mere colourable variation. All which can be done is to ascertain in every case as it occurs whether there is such a resemblance as to deceive a purchaser using ordinary caution. The standards differ and education is one of the factors. The inability of the ordinary public in India to read is a factor to be taken into consideration. [p. 362, cols. 1 & 2.]

In determining whether the right to a trade mark has been infringed actual physical resemblance of two marks is not the sole question for consideration. If the goods of a manufacturer, from the marks or device he has used, have become known in the market by a particular name the adoption by a rival trader of any mark which will cause his goods to bear the same name in the market may be as much an invasion of right of that rival as the actual copy of his device. [p. 365, col. 2.]

Johnston v. *Orr-Ewing* (7) and *Seixo* v. *Provezende* (8), relied on.

Payton & Co., Ltd v. *Snelling, Lampard & Co., Ltd.* (1) and *Boord* v. *Bagots Hutton & Co.* (5), distinguished.

The question as to how damages are to be assessed in a case of infringement of trade mark is not free from difficulty. The profits made by the defendants cannot always be a true criterion of damages awardable to a plaintiff. [p. 366, col. 1.]

Sir Dr. *Tej Bahadur Sapru*, Messrs. *P. N. Sapru* and *R. K. Malaviya*, for the Appellants.

Messrs. *B. E. O'Conor* and *K. N. Laghate*, for the Respondents.

JUDGMENT.—This suit was filed originally in the Court of the Subordinate Judge of Cawnpore. By consent, it was transferred to this Court, partly on the ground of expedition but mainly because the case was stated to be one of great general importance to the manufacturing community.

The plaintiffs, Swadeshi Mills Co., Ltd., are manufacturers of various kinds of cotton goods and the undertaking is managed by the well-known firm of Messrs. Tata & Co. The original defendant was a firm known as Messrs. Juggi Lal Kamlapat. After the suit was filed, it was discovered that the business had been incorporated as a private Company and, therefore, the Company was added as the 2nd defendant.

The plaintiffs' case, as disclosed in the plaint, and put forward by Counsel when the issues were framed, was that they had been, since 1888, manufacturing cotton goods of various kinds and used from the very first a lotus flower as their characteristic trade mark. It was stated that since 1909, their principal trade marks had taken three shapes. One is a coloured label bearing a lotus flower and some lotus buds emerging from water as shown by the topmost figure on the left hand of the photograph marked as Ex. 3, dated the 19th of May, 1926. Exhibit E is the actual label and shows a dark red and pink flower. It is the one almost invariably used but at times on a very small portion of their goods the plaintiffs use a plain blue lotus flower (Ex. J). Exhibit E is not unlike the natural flower. The blue lotus is fanciful. The second is an oval impression stamped by mechanical means on cloths and individual garments, bearing the same flower and buds as the coloured label, with a letter press indicating the name of the plaintiffs. Exhibits 3 and 3A are the impressions made on the goods. Below the oval is an enclosed space within which the word *kamalchap* appears in Gujrati language. The third is shown in the middle photograph on the left hand side of the same photographic Ex. 3 and has been described throughout the evidence as a trefoil. Exhibit F is the impression as it appears on cloth. The letter press contains the name of the plaintiffs and an inscription to the effect that the mill is a manufacturer of Indian goods and is Indian in its every feature. The plaintiffs used these marks singly or in combination to indicate goods manufactured by them. The coloured lotus flower (Ex.

E) was used either by itself or in conjunction with the trefoil (Ex. F.). Other cloths bore the oval impression No. 3 together with the pediment of *kamalchap* and the 'trefoil' below it. The plaintiffs alleged that by thus using these impressions and labels for a long time they have acquired for their goods the popular name of *kamalchap* (lotus ticket) and that these marks have become known to the trade and the public as indicative and exclusively so of goods of their manufacture and of their manufacture alone. It has also transpired, in the course of the evidence, that the plaintiffs claimed that their goods were also known as *phulchap* (flower print). The plaintiffs' goods have a wide sale over a great part of India but the places with which this action was concerned were principally Cawnpore, Delhi, Calcutta and Amritsar. The defendants, so the plaintiffs alleged, with the object of stealing the trade of the plaintiffs, manufactured cotton goods in their mill and affixed and applied lables and marks similar to those of the plaintiffs, the intention being to pass off the defendants' goods as and for the goods of the plaintiffs. The plaintiffs say that they discovered that this was being done by the defendants in July 1924 and called upon them to desist. The defendants, however, refused to do so and the plaintiffs, therefore, brought the suit. The plaintiffs prayed for an injunction restraining the defendants from using their trade marks, asked for delivery up of the goods of the defendants bearing those marks and for an account. Alternatively, they asked for damages. In the course of the trial the learned Counsel for the plaintiffs gave up the claim for accounts and rested his case as regards pecuniary relief on damages only.

The defendants filed separate written statements, but their case was substantially the same. The defendant Company, however, pleaded that since their incorporation, they had not used the trefoil and had abandoned also the use of the word *phulchap* in *Hindi*. The defendants denied that the plaintiffs' marks, stamps, designs had acquired any reputation of *kamalchap* and urged that even if they had done so, the plaintiffs were not damnified as the defendants' goods were not enquired for under the designation of *kamalchap*. They further pleaded that the marks and stamps and labels used by them were neither an actual nor a colourable imitation of those used by the plaintiffs and there was no reasonable probability of deception and they alleged that the plaintiffs had no proprietary title to the marks and labels claimed by them and the plaintiffs were not entitled to any relief.

The following issues were settled in the presence of the learned Counsel for the parties and with their assistance:—

(1) Have the plaintiffs since the year 1888 been using continuously the design of a coloured lotus flower (Ex. A) emerging from water and since the year 1909 till the date of this action a lotus of the pattern as Ex. E, on *dhotis*, *chaddars*, long cloths and other goods?

(2) Have the plaintiffs been impressing continuously on their said goods the triangular and oval design in conjunction with each other (Exs. 3, 3A and F) since at least the year 1909? (Exhibits 3 and 3A are one and the same, the only difference being in size and clearness of print).

(3) Has the user referred to in Issues Nos. 1 and 2 given to the plaintiffs any exclusive right to the said design and figure so as to enable them to restrain any person manufacturing or selling goods with a colourable imitation of the same design attached thereto and figures impressed thereon?

(4) Have the said goods of the plaintiffs so distinguished as aforesaid acquired a reputation in the Indian market? Are the said goods of the plaintiffs known to the trade or to general public under the name of *kamalchap*?

(5) Have the defendants by use of a flower (Ex. D) and by impressing the oval design (No. 4) and the triangular design (Ex. G) got up their goods in similarity to those of the plaintiffs and have thereby imitated the same and have passed off their goods as and for the goods of the plaintiffs?

(6) Is the use by the defendant of designs aforesaid such as to induce a belief in the public that the goods of the defendants are those of the plaintiffs?

(7) Has the registration by the defendants referred to in para. 20 of the written statement any and what legal validity or effect?

(8) Are the plaintiffs entitled to (1) an injunction, (2) delivery up of goods bearing

the designs and figures and (3) an account or any and what damages?

FINDINGS.

Issue No. 7.—This issue may be disposed of at the outset, as being the least important point in the case. It appears that the defendant firm "registered" their label (Ex. D) in Calcutta under Registration Act XVI of 1908. That Act relates to registration of documents alone and has nothing to do with the registration of trade marks. We hold, therefore, that the registration had no legal validity, or effect.

Issues Nos. 1 and 2.—The evidence on this point consists of the statements of several witnesses, but those who fixed the date are two in number. Mr. A. M. Kuka is an Assistant Secretary to the plaintiffs. He proved that the plaintiffs came into existence in 1887, and immediately thereafter the plaintiffs chose a lotus flower as their design and that Ex. A is the original design. It is still in use; its use is so limited that it does not figure in this case otherwise than as part of the narrative. They had also other designs which lie outside this case and were only incidentally mentioned. In 1909, the coloured lotus flower (Ex. E) was adopted and has since been in continuous use. In the same year, the oval print of the lotus with the pediment of *kamalchap* (Nos 3 and 3A) and the trefoil (Ex. F) were decided on as distinctive marks. The coloured lotus flower and the oval print were both "registered" at the office of the "Mill Owners Association" in Bombay, but by some oversight, the trefoil was not. In 1923, the Mill Owners Association revised their registration book and the trefoil was then "registered". It has, however, been in use since 1910. Mr. Kuka described how the coloured lotus flower and the impressions (the oval with pediment and trefoil) are used on all save a negligible quantity of the cloths and individual garments manufactured by the plaintiffs. Mr. Kuka has not been cross-examined on this point and there is no reason for not accepting his statement as to the dates when the several labels and designs came into use. On these points he was confirmed by Mr. Amaria who is the head clerk in the plaintiffs' weaving department. Numerous witnesses, with experience in the trade, varying from 5 to 30 years, have sworn that they are familiar with the plaintiffs' labels and designs, and have seen them continuously for many years on the goods of the plaintiffs. It may be observed here, that the oval design and the pediment bearing the words *kamalchap* under it, form one impression and in mentioning the 'oval design' we include the pediment *kamalchap*. We answer the Issues Nos. 1 and 2, therefore, in the affirmative.

Issue No. 4.—This issue also must be answered in the affirmative, the evidence on the point being overwhelming. We have already said that the coloured lotus flower label (Ex. E) and the impression of lotus in the oval (Nos. 3 and 3 A) and the trefoil (Ex. F) came into use in 1909. The trefoil, it must be noted, was never used by itself. Its value lies in the use to which it was put in conjunction with the other marks. It is, however, the lotus flower, either coloured or impressed, to which both parties attach the greater value.

The evidence of the association of the lotus with the goods of the plaintiffs consists of statements of about 20 witnesses, a few of whom were examined on commission. Mr. Kuka, the Assistant Secretary of the plaintiffs, states that the plaintiffs' goods are known and enquired after as *kamalchap* goods and that the 'lotus' stands for anything manufactured by the plaintiffs. Mr. Sheo Sahai Mal is a member of a large and influential firm known as Bilas Rai Hardat Rai which deals in cloth. He swears that for the last 15 years he has been seeing the plaintiffs' goods either as being marked with *kamalchap* or bearing the coloured lotus label and that customers demand the plaintiffs' goods as *kamalchap* goods. He added that when anybody asked for *kamalchap* goods, the witness always understood him as requiring cloth manufactured by the plaintiffs. The cross-examination brought into prominence the extent of the business done by his firm in the plaintiffs' goods alone. He proved that they sold every year between fifteen and sixteen lakhs of *kamalchap* goods (equivalent roughly to £100,000). The cross-examination of this and other witnesses of the plaintiffs was directed to establish that they had really no means of ascertaining whether the plaintiffs' goods were known as *kamalchap* The suggestion was that this witness and most of the other witnesses were wholesale traders, that the plaintiffs' goods would be sold by them with reference to the numbers stamped on them and that the expression *kamalchap* by itself was not in use and would convey no

clue to the kind of goods which a customer might want. It is, however, certain from the statements of this and other witnesses and also manifest from the admissions of the defendants' witnesses, which we shall examine at the proper moment, that the *kamalchap* or lotus print was recognised as indicating and referring exclusively by goods of the plaintiffs' manufacture and that the quality and the size of particular goods were indicated by the numbers impressed on the cloth or individual garments. We can see no reason to doubt that the wholesale dealers would be well aware of the name that was borne by the plaintiffs' goods and given to them by the purchasing public in general and this same remark applies with greater force to the retail seller in daily touch with the ultimate consumer.

The plaintiffs' agent in Cawnpore was a most important witness. His firm sells cloth worth about 28 lakhs of rupees a year, for the plaintiffs in the Cawnpore market. He stated that the plaintiffs' goods went by the name of *kamalchap*. He also said that the goods of the plaintiffs were known in the Delhi market, not only as *kamalchap* but also as *phulchap* (flower print). Capital was sought to be made, by the defendants, out of the fact that the expression *phulchap* was not mentioned in the plaint and, at one time, the impression was sought to be created in the mind of the Court, that this allegation of the plaintiffs that their goods were also known as *phulchap* was an invention put forward since the filing of the plaint. This, however, is not correct. The very words *phulchap* were used by the plaintiffs in the original notice sent by the plaintiffs to the defendants, asking them to desist from using a lotus and other designs similar to those of the plaintiffs. It is quite easy to understand why the plaintiffs' goods should have come to be known as *phulchap* as well as *kamalchap*. It is by no means certain that a large proportion of villagers would know that the coloured label and the oval indicated that species of flower known as *kamal* and, therefore, they would refer to it by the generic name as *phul*. The attempt of the defendants to establish that the lotus was a commonly used design failed. Only two such flowers were produced (Ex. S. N. 1 and Ex. S. N. 2) and no history was given of either of them. The register of the Mill Owners Association, Volume II (containing names bearing letters N to Z) was produced in Court and out of the 314 designs it contained, there was not one which bore any resemblance to a *kamal* or a lotus except the plaintiffs' designs as therein recorded. The evidence of Delhi witnesses examined before us and of witnesses examined on commission clearly shows that the plaintiffs' goods have an alternative name of *phulchap* and this fact will have an important bearing when we come to examine what the defendants did in order to appropriate a portion of the plaintiffs' trade.

The association of *phulchap* with the plaintiffs' goods was brought out clearly by the witness Sri Newas. Just as in the case of the previous witnesses, his firm does an enormous annual business in the plaintiffs' goods selling some 17 lakhs of rupees worth each year, (*i. e.*, about £115,000). Indeed, he said that the word *phulchap* was really more in use than the word *kamalchap* and we accept this evidence on this point. Incidentally, it may be mentioned here, that dealers in the plaintiffs' goods in Delhi, Cawnpore and in some other places are known as 'Nagpurwalas'. This statement is necessary to understand the evidence of certain witnesses and one document by which a customer demanded plaintiffs' goods as those of 'Nagpurwalas.'

The next witness was Onkar Nath. He comes from Amritsar. He is a member of a firm known as Ram Narain-Kishen Dayal, who deal in plaintiffs' goods. He swore that the plaintiffs' goods were known in Amritsar either as *kamalchap* or as *phulchap* and that all the goods handed by him bore a *kamal* in one form or another, *i. e.*, coloured lotus flower or oval. He added: "Everybody knows the plaintiffs' goods by the *kamal* flower on them."

In cross-examination he said that most people purchasing goods did not know the names of the Swadeshi Mills or of Tata & Co. He added that both retail and wholesale purchasers knew that the *kamalchap* or the *phulchap* were the distinctive marks of the plaintiffs' goods. Other witnesses on the point are:—

Kishen Chand Atma Singh Milkhi Ram	} From Amritsar.

Sheo Dat Rai Bansi Dhar Ram Chandra Raja Ram Har Narain Sheo Shankar Ganga Ram	From Cawnpore
Ram Chander Shyam Sunder Lal	From Delhi.

They are respectable and trustworthy witnesses and unshaken in any degree in cross-examination and we accept their evidence.

Before leaving the plaintiffs' evidence we should call attention to a curious circumstance which arose in four instances when the witnesses were identifying the exhibits. According to the usual practice, the witnesses, awaiting call, were out of Court and presumably were unaware of the evidence given in the box by previous witnesses.

The three designs of the plaintiffs were in a brown paper covered book (Book I) and the alleged infringing designs were in a book similar in all outward respects (Book II). Exhibit G (the defendants' trefoil) was held up to the witness Onkar Nath, he then being about 4 feet away from the book. The light in the Court was brilliant. He said: "I have seen this mark on hundreds of pieces of goods of plaintiffs' manufacture." When it was pointed out to him that it was in fact the defendants' trefoil he was not at all prepared to admit the mistake, seemed to suspect a trap, Ex. G was then put into his hands and he said "I now see the name of defendant upon it." He was then given Ex. F for comparison and said: "If one cannot read the words on Exs. F and G one is apt to be deceived. I have been seeing Ex. F for the last 15 years and am quite familiar with it. I am quite familiar with the shape. If I do not read the *Hindi* letters on it then I will have to look at it carefully and then I will be able to say if it is the mark of the plaintiff." Another witness, Kishan Chand Behan, who has for seven years been selling very large quantities of the plaintiffs' goods was also shown Ex. G and said that it was not the defendants' mark. In fact it was, and he, being able to read, at once recognised his mistake when the exhibit was handed to him.

He it was to whom Mr. Onkar Nath showed some of the defendants' goods bearing the alleged infringements at the time of their discovery. On this point he said: "At first I thought that what Mr. Onkar Nath was showing me was the face plate (*i.e*, the impress) of the plaintiffs but when I read the words I saw immediately that it was not the plaintiffs."

A third witness, Milkhi Ram, identified Ex. E and Ex. F correctly but when shown No. 3 in the ordinary sequence said: "That is the imitation." No. 3 and No. 4, being respectively, the plaintiffs and defendants' ovals, were then handed to him and he distinguished them correctly adding "the man who reads them will not make a mistake, the man who does not read them is likely to make a mistake." Under cross-examination Bansi Dhar was shown Ex. F and identified it correctly. Then he was shown Ex. G (the defendants' trefoil design) and said: "This is the design of the Swadeshi Mills." Sir Tej Bahadur Sapru asked him not to read the print and the witness studying the design from a distance of about 5 feet said: "This exhibit is the defendants' trefoil design."

These mistakes made by men accustomed to handing large quantities of the plaintiffs' goods over a long period of time are, in our opinion, significant. There can be no doubt that the mistakes were genuine and were corrected immediately, not by a recognition of difference in outline but by the reading of the text. It is the plaintiffs' case that the defendants have achieved a large measure of their success in disposing of their goods by reason of the illiteracy of 90 per cent. of the population, who have in their minds a vague general idea of the lotus flower, oval and trefoil and being unable to read are at once attracted by the similarity of the defendants' designs and are satisfied that they are the goods of the same manufacture as they have bought in years past.

Six witnesses of the defendants admitted that *kamalchap* stood for the plaintiffs' goods. Murli Dhar, from Cawnpore, in his examination-in-chief tried to show that the plaintiffs' goods were known in the market by numbers alone. Later, he admitted, that he knew Ex. E to be the plaintiffs' label and the impressions Exs. 3A and F as plaintiffs' oval and trefoil. In cross-examination he was asked why a label was employed, not only by the plaintiffs, but also by the defendants and other manufacturers of cloth. The witness began by saying that the label was meant to beautify the stuff and that, in the opin-

ion of the witness, was the only object of the label. He, however, did not adhere to this palpable absurdity and, in the next sentence, admitted that every mill used its own peculiar ticket (label) lest its goods should be confounded with the goods of another mill. Further on, he said that when he found an article of cloth bearing the coloured lotus label (Ex. E) he knew at once that it was the manufacture of the Swadeshi Mills, and further that if anybody asked for *kamalchap* goods, he would know that he wanted the goods of the plaintiffs' manufacture. His evidence, therefore, materially built up the plaintiffs' case.

The second witness, who is a broker employed by a firm which sells defendants' cloths, admitted in cross-examination that if anybody asked for *kamalchap* goods he would, as a broker, take the customer to the shop of Nagpurwalas, that is to say, to the firm which sells the plaintiffs' cloth at Cawnpore, *viz.*, Ram Narain-Kishen Dayal, or to any other shopkeeper who might sell plaintiffs' goods. Similarly, Madan Lal, who sells the defendants' goods agreed that tickets or labels were attached to indicate the manufactures and that he would be able to tell who were the manufacturers of a certain article, if he knew their 'picture.' He added that if he looked to the 'picture' without reading the print, he would be able to recognise the picture as plaintiffs.

Ram Ratan in cross-examination said that on seeing, on any goods, the coloured lotus label (Ex. E) he would know that it was the manufacture of the plaintiffs.

The witness Mannu Lal described how the productions of various mills were known by the labels or prints they bore, *e. g.*, the 'tailor print,' and similarly that plaintiffs' goods were known as *kamalchap*.

The last witness of the defendants on the point, *viz.*, Mahabir Prasad, made a somewhat sinister admission, namely, that if anybody asked for *phulchap* goods from him he would put before the customer the goods manufactured both by the plaintiffs and the defendants and ask him to make his choice.

We have for the foregoing reasons no hesitation in holding that the plaintiffs' goods have acquired the trade name of *kamalchap* in the Indian market and among the general purchasing public. The failure to include the words *phulchap* in the plaint was due to an oversight. Had they been included we should have held that the plaintiffs' goods were also known by that alternative name.

Issues Nos. 3, 5 and 6.—These three issues can conveniently be grouped together. The photograph Ex. 3, bearing the date on 19th of May, 1926, is a reproduction of the label and impressions used by the plaintiffs and the defendants respectively, the three impressions on the left being those of the plaintiffs and on the right those of the defendants. In examining them a disparity in the size of the ovals will be noticed. In fact the enlarged oval of the plaintiffs was selected for the photograph because the impression of No. 3 was faint. No. 3 and No. 4 should be compared to show the slight actual difference in size between the ovals of the plaintiffs and defendants. Similarity being a matter for the Court, we decided not to allow any evidence as to the opinion of witnesses on this question—*vide* s. 45 of the Indian Evidence Act, and *Payton & Co., Ltd.* v. *Snelling Lampard & Co.* (1).

It will be noticed that the two top pictures are both of a lotus. It has been conceded by Mr. Kamlapat, the head of the firm the defendant No. 1, and the Chairman of the Board of Directors of the defendant No. 2, and by his son Mr. Padampat, one of the directors of the defendant No. 2, that their label (Ex. D) does represent a *kamal* (lotus). The similarity between the two pictures at the top lies probably only in this that both represent a lotus. The two middle pictures, the two trefoils, are, no doubt, again similar but with this difference that the defendants' picture on the right hand is a little more elongated than the plaintiffs' picture on the left. At the bottom are the two ovals. The similarity of the appearance is apparent. The difference is this, that while the defendants' oval contains a rose branch with a flower the plaintiffs on the left contains a lotus and the defendants' pediment under the oval contains the word *phulchap* in *hindi*, while the plaintiffs' pediment on the left contains the word *kamalchap* in Gujrati character. There is a difference in the letter press also and there are similar differences in the letter presses of the two sets of pictures above the ovals. Examples of the actual appearance of the cloths with

(1) (1901) A. C. 308; 70 L. J. Ch. 614; 85 L. T. 287; 17 R. P. C. 628.

the oval and trefoil of the plaintiffs and defendants respectively are shown by Ex.K. P. 18 and Ex. K. P. 19.

Before we consider the question of similarity and the question whether goods of a similar character bearing the defendants' impressions are likely or not to pass off as goods manufactured by the plaintiffs, it wiil be worth our while to examine the history behind the defendants' designs.

The plaintiffs say that their great volume of trade in Cawnpore, Calcutta, Delhi and elsewhere, but especially in Cawnpore, attracted the attention of Mr. Kamlapat, the proprietor of the firm Juggi Lal-Kamlapat and he determined to go into the cloth manufacturing trade and to enter into competition with them. To that the plaintiffs take no exception. Their case, however, is that the defendant firm sought to obtain and did, in fact, obtain an immediate market for their goods by a close imitation of their designs and that this was done intentionally and as part of a campaign of imitation.

The evidence shows that Mr. Kamlapat and his family have been resident in Cawnpore for many years. At sometime in 1922 he decided on this new venture. He erected mills and manufactured various kinds of cloth and garments and in particular cloth and garments closely approximating in quality and appearence to the five particular kinds by which practically the whole of the plaintiffs' trade in Cawnpore was built up and maintained. Of this also the plaintiffs make no complaint recognising it as an every day incident of trade.

The evidence establishes that at first Mr. Kamlapat used the design of a shrub in a flower pot. Shortly after he took the figure of the goddess Lakshmi, at times seated, at times standing.

Then on the 30th of June, 1922, he wrote to Messrs. Hate & Co., a firm of engravers and colour printers at Bombay, and wanted a quotation for a large number of labels. "The design is to be a Lotus Flower of dark red colour and the background should be the colour of water." A rough sketch was enclosed. After some immaterial correspondence, Messrs. Hate & Co., wrote on the 18th of July that the lotus design was the property of the Swadeshi Mills (the plaintiffs) and expressed regret that they could not copy or make another lotus design and requested Mr. Kamlapat to suggest any other design. Messrs. Hate & Co. had spoken of the lotus design having been "registered" by the plaintiffs and Mr. Kamlapat, on the 21st of July, asked for "one ticket of that design for our inspection." In the witness-box Mr. Kamlapat admitted that he had seen the red and pink coloured lotus flower (Ex. B) of the plaintiffs hundreds and hundreds of times before June 1922. In reply Messrs. Hate & Co. are said to have sent the defendant the all blue label of a lotus flower which is a design very rarely used and then only on fancy and unbleached cloth. The sending of this blue label by Messrs. Hate & Co. rests upon the evidence of Mr. Kamlapat alone and it is curious that Hate should not have sent the usual dark red and pink label of the plaintiffs when it was owing to a request for a lotus of a dark red colour that they had raised objection. If in fact the blue label was sent, Mr. Kamlapat may have thought that the plaintiffs had failed to register the dark red and pink design and attaching some fancied value to registration may have thought he could steal a march upon the plaintiffs by adopting an imitation of it and "registering" it. However that may be a fortnight later, Mr. Kamlapat sent to Messrs. Hate & Co. a design which was the copy from which was printed (Ex. D) the first of the alleged infringements, and the defendant firm and the defendant Company have used between December 1922 and December 1925 no less than 6,05,310 of these coloured lotus labels on their goods and as can be seen by the figures, their sales immediately increased. Pleased as we believe him to have been with the success achieved by his coloured lotus label, he decided to stamp his goods with an oval and pediment and also with a trefoil design and on the 19th of July, 1923, he wrote to Messrs. Ganguli & Co., enclosing two sketches for blocks. Blocks were made and the impressions are No. 4 (the oval) and Ex. G. In a letter of the 25th July, 1923, Mr. Kamlapat directed the engravers that the line round the flower in the oval design should be zigzag and this, in our opinion, is one instance amongst many in which in the preparation of the designs Mr. Kamlapat was making careful and calculated differences.

Neither the defendant firm nor the Company kept any record of the particular kin of cloth or garments on which one or oth or both of these two marks were impresse but it is not disputed that they were used

on an immense number of goods as the sales accounts establish.

Sir Tej Bahadur Sapru, who appeared for the firm, opened Mr. Kamlapat's case along the only line which was possible. He said that Mr. Kamlapat knew that the plaintiffs had been doing business in Cawnpore for many years and was aware of their prosperity and was also familiar with the labels used by them, that "When he devised these things he believed and honestly believed that he had created designs with essential differences"; that his designs were not calculated to deceive and that even assuming a remarkable similarity there was no reasonable likelihood that such designs would deceive.

That was not at all the way in which Mr. Kamlapat at the outset presented his own case and he was only driven into that position by cross-examination. He had previously been invited to study the 314 designs in the register of the Bombay Mill Owners Association. He went through them with care and agreed that, save for the plaintiffs' designs which were in the register, there was no design of a lotus flower or oval or trefoil or any design in any way resembling any of these three marks. We regret to have to say that Mr. Kamlapat showed himself an untruthful and dishonest witness. In examination-in-chief he answered the questions intelligently clearly and to the point but under cross-examination such were his evasions that in more than half of the questions put to him, a member of this Bench had to intervene after his first answer had been given and frame the question in alternative ways so as to endeavour to elicit the plain answer to the original plain question. To such a length did this go that it became the practice for the final answer to be repeated by the Judge and agreed by Counsel before it was put upon the record. The following extracts from his evidence will demonstrate the dishonesty of his methods and of his evidence.

He said that "a trade mark does not help to sell goods at all", but he made the most important admission "since I began to use the coloured lotus flower my goods began to sell better." He said that before choosing his designs he had seen the plaintiffs' marks on their goods hundreds and hundreds of times, that he 'determined' to have a lotus flower, that he knew he plaintiffs were selling goods in Cawnpore with the lotus label and that they were doing a large trade, about 200 lakhs in the years between 1914 and 1924. He gave several reasons for using the lotus, "I put the coloured lotus flower on for the sake of beauty. In every case in which I use the coloured lotus flower.....I do so because it is a pretty picture." He said it was a "pure accident" that his goods and those of the plaintiffs had an oval with pediment and a trefoil and also an accident that they were placed in the same position on the goods of each and stamped in the same colour.

It was not until August 1924 when he got the letter of complaint from the plaintiffs that he "recollected" that on his goods the marks were in the same order and were an oval with pediment underneath and a trefoil.

The 'pure accident' theory was somewhat undermined by his subsequent admission that he "borrowed" the idea of the trefoil from plaintiffs' marks "from seeing it on plaintiffs' goods." He said he could give no "special reason" why he chose the oval with pediment and the trefoil. Eventually he brought himself more into agreement with the sensible line adopted by Counsel in his opening.

In substance it came to this that he had intentionally copied the designs of the plaintiffs. "When I made all those differences which I have pointed out, I did think that the Swadeshi Mills would have no cause for complaint."....."We had made differences in each design which we thought took away any imitation." Whilst being perfectly ready to give up the oval with pediment and the trefoil he maintained his right to the use of the coloured lotus flower. He concluded his evidence by saying "when I put my *kamal* flower on with its differences from the flower of the plaintiffs I knew there would be competition and that was my intention." "I think the differences I have made in Ex. D when compared with Ex. E are such that the law will allow me to use it." It will be noticed that on many of the cloths which have been exhibited there is the figure of the goddess Lakshmi which has been and is being widely used by the defendants. An illuminating incident occurred when the defendants put forward a coloured design (Ex. K. P. 25) which on cross-examination was admitted by the defendant to be the mark of the Gujrati Spinning Mill, a firm of old stand-

ing. "The coloured picture" he said "of theirs is identical with the picture I stamp on my cloth," (*vide* Ex. P. P. 3).

Mr. Padampat, the son of Mr. Kamlapat and a Director of the Company was called. He is a man of high intelligence and was not prepared to agree with his father that a trade mark was of no value. On the other hand he said that the coloured lotus flower was no doubt of very great commercial value to the plaintiffs, arising from its use year after year and the increasing volume of sales. Whilst he was willing to give up the oval and pediment and trefoil he objected to discontinue the use of the coloured lotus flower because they had used it on their goods since December, 1922, and it had become their trade mark. When asked about the five classes of goods which it is alleged that the defendants particularly selected for competition with the plaintiffs he accepted the plaintiffs' figures of sale in Cawnpore from the 1st of July, 1922, to the 31st of March, 1926, as Rs. 10,345,293.

The effect of Mr. Kamlapat's evidence is quite clear. He intended to adopt the very valuable designs of the plaintiffs and by careful examination and study evolved other designs of a like nature which he thought were such as the law would allow. That he did so with the object of obtaining part of the trade of the plaintiffs by passing off his goods as and for theirs, admits of no doubt. That he succeeded also admits of no doubt.

At sometime or other he must have been advised that his only chance of retaining the valued coloured lotus flower was to jettison the oval and pediment and the trefoil. It was, no doubt, suggested, and it is no doubt hoped, that the Court will say that there exist such differences in the coloured lotus pictures as to disentitle the plaintiff to relief on this branch of the case. In considering the English authorities we shall have to be extremely careful always to bear in mind that the percentage of illiteracy in this country exceeds 90 per cent of the population and that English, Hindi and Gujrati characters convey nothing to the unlettered. This case comes up for decision at a moment when high hopes are being entertained of the development of India's great natural resources. For that purpose capital must be unlocked and some guarantee given that a business laboriously built up shall not be subject to invasion at the hands of an unscrupulous rival. As regards letter press we think that the only present standard that can safely be set up is wholly to disregard differences of name and description in those trades where the article is sold in great quantities to the illiterate rural or urban population. Before we consider the cases, we should clear the ground by pointing out that, although the question was raised in the written statement, as to how far the plaintiffs were entitled to an exclusive right to a trade mark, (*vide* Issue No. 3) nothing was said in argument to show that the plaintiffs, by continuous user of the representation of a *kamal*, were not entitled to use the same and to stop the defendants from using it in a manner likely to prejudice the plaintiffs. It is not, therefore, necessary for us to cite any authorities in support of the well-known principle that in a country like India, where there is no Statute for registering trade marks, a right to a trade mark is acquired by user. We take it, therefore, that the plaintiffs have a title to the trade mark of a *kamal* or lotus and that the only question before us is, whether the defendants are entitled to use their lotus or not. The first case cited by Sir Tej Bahadur Sapru is the case of *Blackwell* v. *Crabb* (2). The head-note runs as follows:—

"The Court will not restrain the use of a label on the ground of its general resemblance to the trade mark of another manufacturer, if it is different in points which a customer would look at in order to see whose manufacture he was purchasing."

The judgment is very short and was given on an interlocutory application for injunction to restrain the defendant from using the labels. The Vice-Chancellor remarked that the case was to be decided by a mere inspection of two labels. Then he proceeded to state that there were similarities and there were also great differences. It appears that the plaintiffs in the case were the well-known manufacturers of pickles and their case was that the defendant had got up a label similar to theirs in order to cut into their trade. Vice-Chancellor Wood proceeded to point out the differences in the two labels and then said:—

"The defendant's name is printed on his

(2) (1867) 36 L. J. Ch. 504.

label at least as large as the plaintiffs is on theirs. The plaintiffs' address is on their label, and there is no address on that used by the defendants."

As to the Royal Arms used by both the parties he remarked that the use was common amongst tradesmen. He added:

"Thus it is difficult to say where the imitation begins, but the important question is, what a customer is likely to look at?...The name is the thing which a customer would look at, and this is conspicuously different."

The case proceeds on the true assumption that everyone wishing to buy the article would by virtue of being able to read atonce see "Crabb and Company" conspicuously printed and would realise instantly that he was being offered a product of a firm other than that of Blackwell.

The next case cited was *Leather Cloth Co.* v. *American Leather Cloth Co.* (3). The report of the case shows the two labels of the two contesting parties and a glance at them shows marked dissimilarity. After an examination of the two marks of the parties, one appreciates why their Lordships agreed that the decree of the Court of Appeal, dismissing the plaintiff's suit, should be upheld. Lord Cranworth says at page 535*:

"The defendant's trade mark is certainly not the same as that used by the appellants. But is it only colourably different? I think it is so different as to make it impossible to say that it is substantially the same. No general rule can be laid down as to what is or is not a mere colourable variation. All which can be done is to ascertain in every case, as it occurs, whether there is such a resemblance as to deceive a purchaser using ordinary caution."

His Lordship then went on to describe the points of similarity and the points of dissimilarity and then remarked:

"The name of the Company is different. The word 'Crockett' is prominently exhibited twice in the plaintiffs' upper half, not once in the defendants'. No one taking the trouble to read the two can say that he would be deceived."

Again in this judgment we see the emphasis laid upon the accepted fact of ability to read and the protection which literacy affords to the public. As remarked by his Lordship, no general rule can be laid down as to what is or is not a mere colourable variation. In other words, the standards differ and education is one of the factors. Quite apart from inability to read, we are satisfied that most of illiterates in this country are so untrained as to eye and brain in the reading and understanding of pictures that they would be quite unable to point out, for example, the difference in the two coloured lotus pictures of the plaintiffs and defendants even if put side by side before them and wholly unable to carry the essential characteristics of either of them in their mind. They would know nothing more than that they wanted a cloth with a red coloured flower gummed or affixed to it. As illustrating the inability which villagers feel to look after themselves in towns and to carry through so simple a transaction as the purchase of a few rupees worth of goods it was proved by Kishan Chand Behan and referred to by other witnesses that a class of man by name *arhatia*, exist, who go out to the villages and collect 10, 20 or 50 people who want to make purchases. He conducts these men to the town and takes them to the shops and helps them in their purchases. Bansi Dhar also spoke of villagers coming to his shop accompanied by the commission agents or brokers. We were then referred to *Singer Manufacturing Co.* v. *Loog* (4). In this case, it appears, the defendants had got up a sewing machine similar to that known as Singer's. The defendants were said to have endeavoured to obtain and to have succeeded in obtaining, for their machines, some of the reputation attaching to the plaintiffs' manufacture. The plaintiffs succeeded, in their claim, in part. The defendants had sold machines with a brass plate or label attached to them similar to the trade mark of the plaintiffs. They were restrained from using the plaintiffs' trade mark and there the litigation ought to have ended. But the plaintiffs objected to the use, by the defendants, of the very name 'Singer' in certain advertisements and, before the House of Lords, the plaintiffs contended that the defendants should be restrained from using the name Singer, in any way whatsoever. Their Lordships held that the use of the word 'Singer' was in no way misleading and dismissed the appeal. It appears that the defendants compared their own machine with the Singer's, in the advertisements,

(3) (1865) 11 H. L. C. 523; 35 L. J. Ch. 53; 11 Jur. (N. S.) 513; 12 L. T. 742; 13 W. R. 873; 6 N. R. 209; 11 E. R. 1435; 146 R. R. 248.

*Page of (1865) 11 H. L. C.—[*Ed.*]

(4) (1883) 8 A. C. 15; 52 L. J Ch. 481; 48 L. T. 3; 31 W. R. 325.

and told the public in general that their machine was a better one and they also said that the system they had adopted was the 'Singer System.' It was held that no right of the plaintiffs had been infringed. Lord Selborne in his judgment said:

"The imitation of a man's trade mark, in a manner liable to mislead the unwary, cannot be justified by showing, either that the device or inscription upon the imitated mark is ambiguous, and capable of being understood by different persons in different ways, or that a person who carefully or intelligently...studied it might not be misled."

Sir Tej Bahadur quoted from Lord Blackburn's judgment to be found at pages 34 and 35* of the report, where his Lordship remarked that the defendant was not telling people that the machines sold by him were Singer's machines nor was he using a name similar to Singer's. The quotation was relied on to show that as the defendants were not using plaintiffs' name they were not liable. The comparison is not a good one As we have pointed out the names stamped on the cloths serve in the vast majority of cases to convey no meaning at all. Even if the contrary be alleged, the defendants in the case before us did use the word *phulchap* which had been used in connection with the plaintiffs' productions.

Boord v. *Bagots, Hutton & Co.* (5) was a case strongly relied on by the defendants. This case arose out of the respondents' application to register their trade mark. The application was opposed by the appellants. The Com-ptroller-General, who heard the application, allowed it. There was an appeal to a Single Judge who dismissed the application. The Court of Appeal reversed the judgment of Neville, J., and on appeal was taken to the House of Lords. The applicants were the manufacturers of a liquor and they adopted for their trade mark a cat in boots on snow. The objectors had been using as their trade mark for the liquor (gin) manufactured by them, a cat on a barrel. The question arose whether the use of the picture of a cat was likely to mislead anybody into purchasing defendants' liquor, for that of the plaintiffs. Lord Buckmaster, L. C, pointed out for certain reasons, gin was popularly known as 'Old Tom' and that 'Tom' came to be associated with the cat and that a cat was generally used as a symbol for gin. His Lordship went on to remark (page 386*) that no one could venture to say that one mark could reasonably be mistaken for the other. It was conceded before their Lordships that it was impossible that any deception was likely to occur in the United Kingdom by the label adopted by the applicants. The question that their Lordships had to decide was whether the adoption of the label by the applicants was likely to injure the opponent's trade in the East. His Lordship found that, in their evidence, the witnesses for the appellants drew no distinction between the United Kingdom and other markets. Then his Lordship dealt with the argument that in the East people could not read and they purchased according to the mark the articles bore. In view of this argument he made observations which have been relied upon by the defendants. They are:

"The result of this evidence, therefore, establishes no more than this—that the natives buy according to the mark and not according to the words, and that they look to the mark for the purpose of seeing what it is they buy. If they really look to the mark, deception is impossible, and the only way in which it could arise would be because people would ask for goods as the 'Cat' or 'Cat Brand' goods and traders, knowing that these phrases meant appellants' goods, would deliberately supply goods that were not the appellants simply because the label happened to bear the mark of cat, though it was totally distinct from the cat which forms part of the appellants' device, etc."

Then his Lordship further said:

"I see no reason to attribute such conduct to the dealers nor the innocence to the consumers, and if it occurred the wrong done to the appellants would be one for which they would have to seek a remedy in the Courts within whose jurisdiction the offence was committed. There is, to my mind, no reasonable probability of any such deception arising, nor will the registration of the mark place in the hands of dishonest traders a ready means of furthering a course of deceit."

The question is how far these observations are applicable to this case. To start with, it was conceded that no deception was possible in England. Then a purely hypothetical case was put before their Lordships.

(5) (1916) 2 A. C. 382; 85 L. J. Ch. 605; 115 L. T. 345; 33 R. P. C. 357; 32 T. L. R. 683.

*Page of (1883) 8 A. C.—[*Ed.*]

*Page of (1916) 2 A. C.—[*Ed.*]

The applicants had not yet sent their goods to the eastern market for sale, and it was no part of the applicants' case that the defendants had recently and dishonestly copied their label. Further, Lord Buckmaster indicated that if any deception was practised it would be for the Court within whose jurisdiction the deception was practised to take cognizance of it and it was not for their Lordships to take cognizance of that sort of possible deception. Every case of passing off must be decided on its own circumstances and no decision can be more than a guide as to the general principles to be applied. This case was followed up in the argument, by that of *Payton & Co., Ltd.* v. *Snelling, Lampard & Co., Ltd.* (1). This case, as the note of the reporter points out, laid down no rule of law beyond this, that it is the function of the Judge to say whether two designs were similar and it was not for a witness to express an opinion on the point. In this case, the manufacturers of coffee, sold by them as 'Royal Coffee' took exception to the get-up of the defendants' coffee sold as 'Flag Coffee.' Their Lordships were agreed there was no similarity between the get-up and disagreed with the suggestion that when Royal Coffee was asked for Flag Coffee would be wrapped up in paper with intention to conceal its identity and fraudulently made over to a customer desirous of purchasing Royal Coffee. When once it is conceded that the get-up is not similar, nothing further need be said on the point. It is true that their Lordships remarked that the defendants could not be held liable for any fraud that might be practised by the retail sellers. But this remark must be taken with the fact that there was no similarity between the two kinds of goods. Lord Macnaughten said: —

"In the first place the defendants did not, as it seems to me, pass off or attempt to pass off their goods as the goods of the plaintiffs ...In the next place, it is perfectly clear that no human being has been deceived... The third thing which is perfectly clear is this that...the plaintiffs' goods, if they have acquired a title...in the market, the only title...which they can have acquired is that of 'Royal Coffee' while as regards defendants' goods, if they have acquired or should acquire a title in the market, it is or will be the title of 'Flag Coffee.'"

These remarks must be taken with reference to the facts of the case and cannot be detached from the facts to be applied to those of an entirely different case. Here, Mr. Kamlapat and the defendants Company are not honest traders. They have deliberately stolen the plaintiffs' trade marks not one but three. They have as regards the oval and trefoil intentionally used them in the same sequence. In doing this they have laid on themselves the burden of proving that their practice is not likely to deceive others (see Sebastian's Law of Trade Marks, 5th Edition, page 140 and the cases referred to therein as authorities).

The next case cited on behalf of the defendants was the case of *Birmingham Vinegar Brewery Co.* v. *Powell* (6). In this case the House of Lords affirmed the judgment of the Court of Appeal. Their Lordships decided that the plaintiffs' manufacture, known as "Yorkshire Relish" had acquired a reputation, which went to indicate that the article, bearing the name, was of plaintiffs' manufacture and held that under the circumstances, it was not open to the defendant to call his manufacture 'Yorkshire Relish,' so as to induce purchasers into the belief that it was an article manufactured by the plaintiffs. This case in fact supports the plaintiffs, by reason of the circumstance that the plaintiffs' goods have acquired the name of *kamalchap* and, therefore, the defendants have no right to use a *kamal* as their device or trade mark in order to induce people to accept their goods as and for those of the plaintiffs.

Sir Tej Bahadur Sapru quoted the case of *Johnston* v. *Orr-Ewing* (7) and tried to distinguish it. His first argument was that since this judgment was delivered the trend of authority had gone the other way and the present state of authorities must be inferred from two of the cases previously cited by him, *viz.*, *Payton & Co., Ltd.* v. *Snelling, Lampard & Co., Ltd.* (1) and *Boord* v. *Bagots, Hutton & Co.* (5). We are clearly of opinion that such is not the case. We have tried to show that these two cases were decided on their peculiar facts and have no bearing on the present case. On the other hand, the case of *Johnston* v. *Orr-Ewing* (7) fully supports the plaintiffs' case and we have only to substitute the necessary names and descriptions of labels to make the judgment apply fully to the case before us. It ap-

(6) (1897) A. C. 710; 66 L. J. Ch. 763; 76 L. T. 792.

(7) (1882) 7 A. C. 219; 51 L. J. Ch. 797; 46 L. T 216; 30 W. R. 417.

pears that the plaintiffs had been selling yarn, dyed Turkish red, in the eastern countries with a device of two elephants with a banner between them. The defendants got up similar goods with a somewhat similar device and put them on the market. It was found that the defendants' device was in some respect dissimilar to the plaintiffs' device The Lord Chancellor, (Lord Selborne), however, made the following observations (page 225*):—

"But although the mere appearance of these two tickets could not lead any one to mistake one of them for the other, it might easily happen that they might both be taken by natives of Aden or of India unable to read and understand the English language as equally symbolical of the plaintiffs' goods."

It is impossible to state the contention of the plaintiffs in more appropriate words. In the case before the House of Lords no deception in fact had been proved, nor has any actual case of deception been proved in the case before us. But his Lordship sought for an explanation, as we ourselves sought in this case, from the defendants as to why the defendants should have adopted the particular device of the plaintiffs. His Lordship says:

"Nor am I able to conceive any satisfactory explanation, under all the circumstances of this case, of the adoption by the defendants of that particular device—two elephants at the upper corner of the ticket with a cloth or banner suspended between them—knowing as they did the plaintiffs' ticket, knowing also the character and circumstances of the markets, and entering as they did upon this particular branch of trade with the direct object of competing with and underselling the plaintiffs, unless it was because they had a desire and intention to approach to the plaintiffs' trade marks as nearly as they possibly could. For such desire and intention no motive can be suggested, except that of getting some part of the benefit of the good-will and reputation of the plaintiffs' trade."

The plaintiffs in this case have been doing a very large trade for a long time. The magnitude of their business will be appreciated by the fact that from January 1900 to December 1922 the value of the goods manufactured by them was over 800 lakhs or about $5\frac{1}{2}$ million pounds sterling. Their annual output is now nearly 80 lakhs of rupees and of this they have been selling goods in Cawnpore alone to the approximate value of 28 lakhs of rupees a year. The defendants started a mill and began to manufacture goods similar, at least in five instances, to those of the plaintiffs and began to mark them with some one or other of the ptaintiffs' marks. When the defendant adopted their design they knew that for years the plaintiffs had been selling, in the very market of Cawnpore, goods with their own particular design and they definitely modelled their marks upon those of the plaintiffs. No possible motive can be assigned for this conduct except an intention to cut into the trade of the plaintiffs and to misappropriate some of it to themselves. The slight dissimilarity in the two lotuses are not, in our opinion, sufficient to give the defendants a right to retain and use it, especially in the view, which we reiterate and emphasise as a principal ground of our decision, that the letter press, both of the plaintiffs and defendants, are meaningless symbols to all but an insignificant minority of purchasers.

In the case of *Seixo* v. *Provezende* (8) Lord Cranworth said at page 196*:

"I do not consider the actual physical resemblance of the two marks to be the sole question for consideration. If the goods of a manufacturer, have from the mark or device he has used, become known in the market by a particular name, I think that the adoption by a rival trader of any mark which will cause his goods to bear the same name in the market, may be as much a violation of the rights of that rival as the actual copy of his device."

The case before us exactly fits into the observation of his Lordship. The plaintiffs have acquired a reputation on account of their trade mark and the defendants have no right to adopt a trade mark which can and will be described under the same name as that of the plaintiffs' goods.

Several cases have been quoted on behalf of the plaintiffs to substantiate the proposition that no man has a right to pass off his goods, by adoption of similar devices, as the goods of another. The two cases previously referred to, *Johnston* v. *Orr-Ewing* (7) and *Seixo* v. *Provezende* (8), are enough to establish the plaintiffs' right to succeed.

*Page of (1882) 7 A. C.—[*Ed.*]

(8) (1866) 1 Ch. 192; 12 Jur. (N. S.) 215; 14 L. T. 314; 14 W. R. 357.

*Page of (1866) 1 Ch.—[*Ed.*]

We accordingly hold that the defendants have by the use of devices similar to those of the plaintiffs tried to pass off their goods as those of the plaintiffs and that the plaintiffs have an exclusive right to their designs and figures and are entitled to restrain the defendants from selling goods with a colourable imitation of the plaintiffs' designs.

Issue No. 8.—It has not been controverted that the plaintiffs would be entitled to an injunction in the case of the other issues being decided in their favour. It is equally clear that the plaintiffs are entitled to the delivery up of all the goods bearing designs and labels and figures similar to those of plaintiffs, in order to have these devices and marks removed. The plaintiffs have given up their claim for an account. They ask for damages alone. The question is how are the damages to be estimated and what would be the amount of damages to which the plaintiffs are entitled?

The last question is not free from difficulty and the authorities on the point are not unanimous. The text books (Sebastian, 5th Edition, pages 253 and 254, Kerly, 5th Edition, page 530 foot-note) indicate that while in England the profits derived from the sale by the defendant of imitated goods have been taken to be the measure of damages to which the plaintiff is entitled, in America the plaintiff has been awarded the profits which he would have realised if he had sold the quantity of goods shown to have been sold by the defendant. We are of opinion that the profits made by the defendant cannot always be a true criterion of damages awardable to a plaintiff.

Unless a rival trader commences his career, as did the defendant, by appropriating the trade marks of other firms, there must always be an initial period during which the goods have to acquire by their own merit, by advertisement and "drive" a footing in the market. Good-will has also to be built up. Time and money too are lost, through lack of experience, as was undoubtedly the case with the defendants, who at the outset manufactured one class of goods which were to a large extent unsaleable.

The plaintiffs proved a very moderate figure of all round profit which they showed to be just over 9 per cent. Both parties were anxious to avoid an account as it would in the circumstances have been almost impossible to dissect the various classes of goods manufactured by the defendants and to apportion the profits to those bearing the infringing marks. Moreover, if the enquiry was to be held on the basis of general all round profit, there would have arisen the question as to whether anything like 27 lakhs had been spent by the defendants on the establishment of the business.

That the defendants have succeeded materially in cutting into the plaintiffs' trade is clear. By consent, all the documents filed by the parties are to be treated as 'admitted subject to all just exceptions' and the figures furnished by them are to be treated as correct. The plaintiffs' figures of sale of goods in Calcutta show a steady increase (Exs. B. D. 3 and B. D. 4) till the highest point was reached in 1924. The next year's sale shows a marked decline, from 58 lakhs to 37 lakhs. The same is the case with the Cawnpore figures Ex. B. D. 2. In nine months ending 31st of March, 1926, the plaintiffs sold goods worth only 17 lakhs, while the sale during the previous 12 months was 30 lakhs.

The particular articles in which the defendants directly competed with the plaintiffs and on which they put one or more of the infringing marks were *suti*, *salita*, *chaddar*, *markin* and *dhotis*.

The defendants, in the short period of some three years, sold goods so marked to the value of no less than Rs. 32,00,828. We believe that we are acting generously to the defendants in assuming that if these goods had borne the flower pot stamp or the Lachami design they would have sold 40 per cent. of the total quantity. We think that this is a figure with which a Jury of business men might fairly start, and that they might reasonably and properly give to the plaintiffs' damages at the rate of 9 per cent. upon the remaining balance of 60 per cent.

On this basis, taking the round figure of sales at 32 lakhs, the damages come to Rs. 1,72,800. The actual apportionment of the damages is not a matter of practical importance, because the firm was the property of the Hindu family of which Mr. Kamlapat was the head and that same family hold in the Company shares of the value of nearly 26 lakhs out of a capital of 27 lakhs. As the defendants' accounts do not show how much of the 32 lakhs was

received by Mr. Kamlapat and by the Company respectively, we propose to apportion the damages according to the extent of business done by each defendant. These figures over the relevant periods are roughly Rs. 47,00,000 and Rs. 34,00,000 and so, as between the two defendants, the damages may be divided in the proportion of 47 and 34. On that basis the liability of the 1st defendant would be Rs. 1,00,265 and that of defendant No. 2 Rs. 72,535. These are, no doubt, considerable sums of money but damages are in every case proportioned to the injury done and we are satisfied that the defendants respectively made at least the amount of profit in which we are casting them in damages.

We, therefore, grant a perpetual injunction restraining the defendants, their servants and agents from placing upon goods of their manufacture and from selling any cloth or individual garments to which there is affixed or stamped or otherwise applied any label or design which colourably imitates.

I. The coloured Lotus Flower (Ex. E).
II. The oval (No. 3).
III. The trefoil (Ex. F).

In view of the immense quantity of goods in the possession of the defendants, which bear one or more of the infringing marks and of the practical difficulties attendant upon requiring these goods to be delivered to an officer of this Court, we (with the consent of Counsel for the plaintiffs) order the defendants to remove or erase each and all of the said infringing marks from all cloths and individual garments in their possession. This work is to be completed by the 17th of July, 1926, on or before which date Mr. Kamlapat and his son Mr. Padampat are to make a joint affidavit stating that this has been done and expressing their willingness to give the plaintiffs or an officer of this Court inspection of their goods at their premises should the plaintiffs so desire. If this is done, an order for delivery up of the goods for the purpose of removal and erasure of the offending marks may be avoided. The defendants are to deliver within 14 days to the Registrar of this Court the remaining balance of 2,62,590 coloured lotus flower labels now in their possession. Defendant No. 1 is to pay the plaintiffs Rs. 1,00,265 by way of damages, and defendant No. 2 is to pay to the plaintiffs the sum of Rs. 72,535 damages. The decree in favour of the plaintiffs, with respect to the amount of damages, will be subject to their making good the deficiency in Court-fee, within 30 days of the office report declaring what amount is due from them. In case of failure to pay the Court-fee, the amount of damages, payable by the two defendants together will be limited to the sum of Rs. 25,000 as claimed in the plaint. This amount will be payable by the defendant No. 1 and the defendant No. 2 in the proportion of 47 and 34. The defendants will pay the costs of this action which will include the costs of commissions, and, in this Court, Counsel's fees are to be allowed on the higher scale, and interest is to be calculated on the damages at the rate of 6 per cent. as from the 1st January, 1926, until payment.

This case is to be in the list on the 17th of July next so that if the defendant Company have not, within the time limited, carried out the order of the Court as to the removal and erasure of the infringing marks and duly deposed to having done so, a further order may be made in this respect requiring physical delivery of all the said goods to this Court or to a Commissioner.

A. N. A. *Decree accordingly.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 155 OF 1924.

September 24, 1926.

Present:—Mr. Justice Devadoss.

Syed ALABIN MUHAMMAD AYDROSS CHERIA KOYA THANGAL—PLAINTIFF—APPELLANT

versus

Syed ABDUL KHADIR *bin* MUHAMMAD AYDROSS KUNHI SEETHI KOYA THANGAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Muhammadan Law—Wakf—*Shafi Law*—Wakf, *creation of, of property subject to mortgage, whether valid.*

Creation of *wakf* of property which is subject to mortgage is not invalid according to Shafi Law.

Second appeal against a decree of the District Court, South Malabar, in A. S. No. 663 of 1922, preferred against that of the

Court of the Subordinate Judge of South Malabar, Calicut, in O. S. No. 43 of 1920.

Mr. *K. P. M. Menon*, for the Appellant.

Mr. *K. Krishna Menon*, for the Respondents.

JUDGMENT.—The first question raised in this second appeal is whether the creation of *wakf* or property which is subject to mortgage is invalid according to Shafi Law. This point was not taken in the first Court. A number of issues were framed and the first issue runs thus :—

"Whether the *wakf* deed in question is invalid for any of the reasons stated in the plaint."

In the plaint there is no mention of *wakf* being invalid by reason of its offending against Shafi Law. In the lower Court at the time of the argument the appellant submitted that there were a number of Arabic books of Shafi Law which would support his contention and that they should be referred to. The learned District Judge found that they were not books which were admittedly treated as authorities in this part of the country and he refused to look into them, though, no doubt, the reason he gave was that they being books, in Arabic neither he nor the Vakils for the parties were able to read them and, therefore, he would not look into them. I take it that what the learned District Judge meant was that he could not refer to books which were not accepted as authorities on the subject. Mr. K. P. M. Menon, for the appellant, contends that the law governing *wakfs* in the case of Shafis is to be found in certain books and these must be referred to in order to decide this point. As this point was not specifically raised in the first Court the appellant is not entitled to rely upon it here. It must be said that questions of law may be raised at any stage. But when the question of law depends upon the determination of other questions, namely, whether the books which are supposed to contain the law are really authorities on the subject such points cannot be raised in second appeal. In the grounds of appeal to the lower Appellate Court which are 27 in number this point was not specifically raised. The appellant contented himself by stating that the *wakf* deed was against the principle of Muhammadan Law as understood in this part of the country and against principles that are contained in well-known books and in the decisions of Courts. If he wanted to rely upon an exception to the general rules of Muhammadan Law applicable only to the case of Moplahs that should have been specifically pleaded in the first Court and should have been raised in the grounds of appeal. Mr. Justice Tyabji in his book "Principles of Muhammadan Law" (1913), pages, 387—388 says that "land and everything which admits of use without destruction of the subject and of everything lawfully saleable, such articles as admit of usufruct resumable land, horses or arms," can be the subject of *wakf*. Ameer Ali in his book "Muhammadan Law," Vol. I, at page 544, says: "The *wakf* of Mushaa or property held in joint tenancy is valid. The validity of a *wakf* of buildings or plantations upon another person's land by the owner of the buildings or plantations under a lease is acknowledged." There is nothing to support the contention of the appellant in Wilson's book of Muhammadan Law. When all these text-books which notice the differences between Shafi and Hanafi Law on the various points do not refer to such principles which are not enunciated by the appellant's Counsel can the Court allow him to refer to some books which his client says are authorities on Muhammadan Law. The appellant has filed affidavits containing extracts from some books but there is nothing to show that any of them can be held to be authorities on the Shafi school of Muhammadan Law. It is not every book that is written or published in Arabic language that can be held to be authorities on questions of this kind. I do not think in the circumstances of this case the appellant can be allowed to show that some books which he wants to rely upon are authorities on the subject of *wakf*. I, therefore, disallow this contention.

The second point raised is that the *wakf* is illusory. This point was not raised in the pleadings and it is not open to the appellant to raise it here. He raised a number of contentions as regards the validity of *wakf* but not a word was said in the pleadings of the lower Court as regards the illusory nature of the *wakf*. There is nothing in this point.

In the result the second appeal fails and is dismissed with costs.

V. N. V. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 51-B OF 1925.

October 22, 1926.

Present:—Mr. Hallifax, A. J. C., and Mr. Mitchell, A. J. C.

BASWANTRAO AND OTHERS—PLAINTIFFS—APPELLANTS

versus

DEORAO AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Adoption—Maharashtra School—Widow, succeeding as gotraja sapinda *of last male holder, adoption by, whether valid—Religious conceptions underlying adoption—Adoption, effect of—Adopted and natural born son, rights of—Succession of widow, principles relating to—Adoption after estate has vested in third persons, effect of—Adoption when estate vests in widow as* gotraja sapinda *of last male holder, validity of.*

A Hindu widow who succeeds to the estate of her husband's father as a *gotraja sapinda* can make a valid adoption to her deceased husband so as to divest herself of the estate that has vested in her as *gotraja sapinda*. A son so adopted is entitled to the estate in preference to the reversioners. [p. 372, col. 1.]

[Case-law discussed.]

Per *Mitchell, A. J. C.*—A Hindu widow governed by the Maharashtra School of Hindu Law, may, unless expressly forbidden by her husband, adopt a son to him without having to prove his consent, provided she does so in the proper *bona fide* performance of a religious duty, and neither capriciously nor from a corrupt motive nor in ignorance of her rights. [p. 370, col. 1.]

Yadao v. *Namdeo* (1), followed.

A widow cannot adopt so as to divest an estate which has already vested by inheritance in persons other than herself or her co-widows. [*ibid.*]

If her husband died a member of an undivided family she may adopt only with the consent of his undivided co-parceners or with the consent of her father-in-law. The adoption will not, however, be inoperative if the material interests which the principle is intended to protect are extinguished on the date of the adoption owing to the last co-parcener having died previous to the adoption. Her power of adoption comes to an end when all the spiritual benefits to be secured by the adoption have already been conferred on the spirit of the adoptive father, such as the existence of a son natural or adopted, who has discharged before his death all the pious duties required to secure the spiritual advancement of his father's shade. [*ibid.*]

The religious conceptions underlying the practice of adoption among Hindus are that certain ceremonies performed by a pious Hindu confer spiritual benefits on his paternal ancestors in the direct line; in particular, when a Hindu offers the whole sacrificial cake or *pinda*, he secures the advancement of the spirit of the father, grandfather and great-grandfather, each to an equal degree and no offerings by any other descendant or any collateral are of the same order of efficacy. When a son is adopted his offerings of *pinda* to his adoptive father and to his adoptive grandfather and great-grandfather are as efficacious as the offering of a natural sons and for this reason he is entitled to succeed to share in the family property, as if he were a begotten son. [p. 372, col. 2.]

Per *Hallifax, A. J. C.*—Under the Hindu Law if an adoption is valid at all it is valid entirely, and a person validly adopted becomes for all purposes, spiritual or temporal, the natural son of the person by or to whom he is adopted. On the day of his adoption he ceases to exist as the son of his natural father and comes into existence as the son of his adoptive father. [p. 374, col 1.]

When a Hindu widow adopts to her husband or inherits property as a *gotraja sapinda*, she does so because she is "half the body" of her husband, not because she is related to him by marriage. [p. 374, col. 2.]

Appeal against the decree of the Second Additional District Judge, Amraoti, dated the 2nd March, 1926, in Transfer Civil Suit No. 2 of 1924.

Messrs. *B. W. Joshi* and *M. B. Niyogi*, for the Appellants.

Sir *B. K. Bose*, Messrs. *A. V. Khare*, *P. N. Rudra*, *B. V. Pradhan*, *P. C. Dutt* and *R. R. Jayvant*, R. B., for the Respondents.

OPINION.

Mitchell, A. J. C.—(*October 20, 1926*). —The only question in this appeal is the effect of a certain adoption, which is being challenged by a group of collaterals who would be reversioners but for the adoption and is being supported by the adopted son and various persons claiming under him. The parties are Maratha Deshmukhs of the Amraoti district, governed by the Hindu Law as interpreted in Maharashtra. The following tree shows enough of the family for the purposes of this appeal:—

JANUJI,
(d. 18-7-1875)

Saraswati Bai, (d. 7-5-1922).	= Venkat Rao, (d. c. 1870).	Baliram, (d. 13-5-1875).
Deorao, (adopted 22-1-1893).		

The adopted son Deorao is himself a collateral by birth to Januji, removed by ten degrees. The plaintiff-appellants are collaterals of still another branch and are removed from Januji by nine degrees. The property which forms the subject of the dispute was held by Januji as last male holder. He died on 18th July, 1875, leaving no member of his branch of the family except Saraswati Bai, the widow of one of his predeceased sons. Saraswati Bai got possession of his estate and remained in possession, latterly along with her adopted son Deorao, till her death on 7th May 1922. It is not now disputed that on 22nd January, 1893, Saraswati Bai adopted the

defendant Deorao as son to her deceased husband Venkat Rao.

The question, definitely stated, is whether Deorao is entitled to succeed to the estate of Januji. The validity of his adoption by Saraswati Bai as the son of Venkat Rao cannot be disputed, in so far as the conception of adoption is confined to its religious aspect. The real point in issue is whether his assumption of spiritual duties as a son of Venkat Rao carries with it a secular right to succeed to the estate of Venkat Rao's father.

Argument in this appeal has been lengthy, and rulings have been cited which run into scores. General propositions of Hindu Law have been cited as destructive of Deorao's claim, and have been resisted as inapplicable or unsound. It will be convenient to classify these propositions into two groups—(1) those principles whose application is disputed, and (2) those propositions whose soundness is not admitted. It should be premised that the parties are Hindus of Maharashtra, where a widow who has not been expressly forbidden by her husband may adopt a son to him without having to prove his consent, provided she does so in the proper *bona fide* performance of a religious duty, and neither capriciously nor from a corrupt motive nor in the ignorance of her rights: *Yadao* v. *Namdeo* (1). No disentitling circumstances have been pleaded against the adoption in this case, and it is not disputed that Deorao is the validly adopted son of Venkat Rao. The question is whether he is heir to the estate of Januji.

The principles of Hindu Law whose application is disputed are the following—

(1) The widow may not adopt so as to divest an estate which has already vested by inheritance in persons other than herself or her co-widows.

(2) If her husband died a member of an undivided family she may adopt only with the consent of his undivided co-parceners or with the consent of her father-in-law.

She may not adopt if her husband has had a son, adopted or natural, who has discharged, before his death, all those pious duties required to secure the spiritual advancement of his father's shade.

(1) 64 Ind. Cas. 536; 17 N. L. R. 145; 30 M. L. T. 53; 26 C. W. N. 393; 42 M. L. J. 219; 15 L. W. 565; 20 A. L. J. 481; 24 Bom. L R. 609; 49 C. 1; A. I. R. 1922 P. C. 216; 48 I. A. 513 (P. C.).

The first principle has been established in a long series of rulings, in which *Chandra* v. *Gojarabai* (2), *Gavdappa* v. *Girimallappa* (3), *Shri Dharnidhar* v. *Chinto* (4), *Ramkrishna* v. *Shamrao* (5) and *Lakshmibai* v. *Vishnu Vasudev* (6) may be cited. It has not invariably been acted upon, as may be seen from *Babu Anaji* v. *Ratnoji Krishnarav* (7) and *Bachoo* v. *Mankorebai* (8) but it is not necessary for the purposes of this appeal to enquire into the limitations of the rule, as a discussion of its broadest statement suffices. It has been pointed out that when Venkat Rao died he was joint with his father and his brother Baliram. His interest in the family property passed by survivorship to them. When Baliram died his interest similarly passed to his father; and when the father died *Musammat* Saraswati Bai inherited the estate. It is contended that this succession of vestings destroyed Saraswati's power to adopt. The argument shows confusion of thought. If the succession to Vankat Rao's estate had been in question, and if these vestings could have and had occurred, then perhaps the applicability of the principle could have been argued; but the question concerns the succession to Januji's estate, which has vested only in Saraswati Bai herself, until she adopted Deorao. This question is not complicated by any intermediate vesting contemplated in the rulings which enunciate the principle and the principle clearly has no bearing on this appeal.

The second principle is foreshadowed in *Collector of Madura* v. *Moottoo Ramalinga Sattupathy* (9) and is set out clearly in *Ramji* v. *Ghaman* (10), which has been followed in later rulings. The argument under this head is that Venkat Rao died a member of a joint Hindu family consisting of himself, his brother Baliram and his father Januji. According to the prin-

(2) 14 B. 463; 7 Ind. Dec. (N. S.) 770.
(3) 19 B. 331; 10 Ind. Dec. (N. S.) 224.
(4) 20 B. 250; 10 Ind. Dec. (N. S.) 725.
(5) 26 B. 526; 4 Bom. L. R. 315.
(6) 29 B. 410; 7 Bom. L. R. 436.
(7) 21 B. 319; 11 Ind. Dec. (N. S.) 215.
(8) 31 B. 373; 11 C. W. N. 769; 6 C. L. J. 1; 9 Bom. L. R. 646; 17 M. L. J. 343; 2 M. L. T. 295; 34 I. A. 107 (P. C.).
(9) 12 M. I. A. 397; 10 W. R. P. C. 17; 1 B. L. R. P. C. 1; 2 Suth. P. C. J. 135; 2 Sar. P. C. J. 361; 20 E. R. 389; 3 Mad. Jur. 298; 1 Ind. Dec. (N S.) 1 (P. C.).
(10) 6 B. 498; 6 Ind. Jur. 587; 3 Ind. Dec. (N. S.) 787 (F. B.).

ciple stated, an adoption by Venkat Rao's widow would not be valid without the consent of Baliram and of Januji, or of Januji alone after Baliram's death; and, as they both were dead on the date of the adoption, consent thereto could not be obtained and the adoption was, therefore, invalid. In connection with this argument it is necessary to notice that the respondent Deorao did attempt to raise a plea in the lower Court that Januji had given Saraswati Bai express instructions to adopt him He adduced evidence to prove this. The lower Court declined to entertain the plea and the point has been left undecided. In any case the evidence on this point is of a character which cannot be believed as it is discrepant in itself, and is inconsistent with the evidence of Deorao and his first witness to the effect that Deorao was not born when Januji died. The discussion will, therefore, proceed on the assumption that Januji gave no such express instruction.

The rulings on which the principle is based relate not so much to the existence of a joint family on the death of the adoptive father, as to the existence of such a family at the time of the adoption. The reasoning is that a Hindu widow is entitled only to maintenance from the joint family and she cannot be allowed, by her own independent act, to bring into existence another co-parcener. If she wishes to secure spiritual benefits for her deceased husband she may do so, presumably, by adopting a son to him; but the adopted son will not become a co-parcener unless he was adopted with the consent of the co-parceners, or of the head of the family acting for them. Stated in this form the principle is a reasonable one, but when it is stated so broadly as to govern an adoption which takes place after all the co-parceners have died, it loses its basis of reason. It is intended to protect the material interests of co-parceners and cannot have any force when these interests are extinguished. In the present instance the last co-parcener whose interest had to be protected, Januji, died in 1875, and the adoption took place in 1893, when only Saraswati Bai, who was not a co-parcener was left to represent the family. This principle also does not govern the case.

There remains the last principle relating to the extinction of the right to adopt when all the spiritual benefits to be secured by the adoption have already been conferred on the spirit of the adoptive father. This principle emerges from *Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhry* (11) and requires no discussion in this case, beyond an indication of the fact that Venkat Rao died childless. Indeed, both Venkat Rao's and Januji's spirits still awaited the pious ministrations of a son when Deorao was adopted to Venkat Rao.

There remains now for discussion the principles whose soundness is in dispute. So far, the position is that Deorao is the son of Venkat Rao and the grandson of Januji, and he is entitled to succeed to Januji's estate, notwithstanding its temporary vesting in Saraswati Bai, unless some principle of law can be established to the effect that his adoption as the son of Venkat Rao will not defeat the claim of Januji's reversioners. The appellants reversioners claim that there is such a principle. In *Vasudeo* v. *Ramchandra* (12) and *Payapa Akkapa Patel* v. *Appanna* (13) it is stated in the form that the only widow who, on her own authority, can adopt a son so that the estate passes to him is the widow of the last male holder of that estate. In *Datto Govind* v. *Pandurang Vinayak* (14), *Dattatraya Bhimrao* v. *Gangabai* (15) and *Yeknath Narayan* v. *Laxmibai* (16) it is stated differently. In the words of the heading to the first cited ruling it runs—"a Hindu widow who succeeds to an estate not her husband's but as a *gotraja sapinda* of the last male holder .....cannot make a valid adoption." These two forms amount to the same principle, as all widows succeed to an estate as *gotraja spinda* except the widow of the last male holder. In the present case Saraswati Bai was a *gotraja spinda* to Januji.

The principle has been evolved by the only statutory High Court which deals with the special rules of Hindu Law applicable to women in Maharashtra, and it is entitled to the utmost respect. It has been supported before us on the following abstract grounds. The sacred texts lay down a certain order of succession, in which *gotraja*

(11) 10 M. I. A. 279; 3 W. R. P. C. 15; 1 Suth. P. C. J. 574; 2 Sar. P. C. J. 111; 19 E. R. 978.
(12) 22 B. 551; 11 Ind. Dec. (N. S.) 949 (F. B.).
(13) 23 B. 327; 12 Ind. Dec. (N. S.) 217.
(14) 32 B. 499; 10 Bom. L. R. 692.
(15) 77 Ind. Cas. 17; 46 B. 511; 24 Bom. L. R. 69; A. I. R. 1922 Bom. 321.
(16) 77 Ind. Cas. 117; 47 B. 37; 24 Bom. L. R. 836; A. I. R. 1922 Bom. 347.

sapinda widows have been given a preferential position. The Courts must be careful not to exaggerate the preference and distort the line of succession by giving these widows a power further to divert the succession. The argument has some force, but it is open to the re-joinder that the sacred texts also recognise an adoption and declare an adopted son to have the same rights as a natural born son. The rule restricts the power of adoption to the widow of the last male holder, and it has still to be shown that there is a logical reason for drawing the line at this particular point.

It can be shown, to begin with, that the rule has not been invariably applied by the High Court of Bombay itself, and that widows have been allowed to make valid adoptions though they were not the widows of the last male holder of the estate. Thus in *Babu Anaji* v. *Ratnoji Krishnarav* (7) it was held that an adoption by a widow of a son to her deceased husband made the adopted son the heir of his adoptive grandfather. The adoption in this case was held to be valid as against a reversioner of the adoptive grandfather. In *Payapa Akkapa Patel* v. *Appanna* (13) a similar adoption was held to be valid, as it had been made with the consent of the widow of the last male holder, in whom the estate had vested. In this case, the question of the rights of reversioners was not raised. In *Narhar Govind* v. *Balvant Hari* (17) it was held that a grandmother can validly adopt when the estate had passed directly from her husband to the grandson and has come back to her directly from the grandson without the intervention of any other heir. The adoption in this case was held to be valid against the reversioners of the last male holder.

The discussions of the High Court of Bombay, therefore, do not show that it is an invariable rule in Maharashtra that only the widow of the last male holder can adopt, on her own authority, so as to vest the estate in the adopted son. The numerous rulings bearing on the point do not show any one set of principles which has been applied throughout; each decision depends on a discussion of previous decisions and appears to have been influenced by the equities of the case. It is not easy to determine the equities in the present case, though on the whole they are probably on the side of Deorao who has been in possession of the estate along with Saraswati Bai since 1893, and has been managing it himself for at least 20 years. On the other hand, he was not adopted until about 23 years after the death of Venkat Rao and 18 years after the death of Januji; and Januji's reversioners are not unreasonable in claiming the estate on Saraswati's death It is necessary, therefore, to find some general principle which will act as a guide in this case.

This will best be found by going back to the religious conceptions underlying the extensive practice of adoption among Hindus, which are the justification for conferring rights of inheritance on an adopted son. These conceptions are that certain ceremonies performed by a pious Hindu confer spiritual benefits on his paternal ancestors in the direct line; in particular, when a Hindu offers the whole sacrificial cake or *pinda*, he secures the advancement of the spirit of the father, grandfather, and great-grandfather, each to an equal degree; and no offerings by any other descendant or by any collateral are of the same order of efficacy. When a son is adopted his offering of the *pinda* to his adoptive father, and to his adoptive grandfather and great-grandfather, are as efficacious as the offerings of a natural son; and for this reason he is entitled to succeed to share in the family property, as if he were a begotten son.

It is from these conceptions of the spiritual bond of the *pinda*, and developments thereof, that the whole of the Hindu Law of succession is derived; and it is possible that their application to the special case of adoption by a widow in Maharashtra may afford a useful general guide. But it most be remembered that the Courts have always been careful to guard the interests of members of the family who would be unjustly prejudiced by an adoption, and any general rule based on religious considerations only must be qualified by any limiting principle which has been clearly and firmly established by judicial decisions.

On these grounds the proposition is advanced that where an adoption secures to the spirit of last male holder of an estate that advancement, otherwise lacking, which is given by the offering of the whole *pinda*, then the imposition of pious duties on the adopted person should carry with it the legal right to succeed to the estate of the last male holder. This broad principle

(17) 80 Ind. Cas. 435; 48 B. 559; 26 Bom. L. R. 528; A. I. R. 1924 Bom. 437.

must, of course, be subject to those equitable restrictions which have already been firmly established, namely:—

(1) that the estate is not already vested by inheritance in a person other than the adopting widow, or her co-widows, and

(2) that if the estate is a share in an estate held by co-parceners, the consent of the co-parceners is necessary.

This proposition seems to strike a fair balance between the spiritual claims of the deceased holder and the material claims of his collaterals, as it will, on the one hand, encourage the adoption of lineal descendants with full spiritual efficacy, and will, on the other hand, avoid the arbitrary divestment of vested estates.

It may be that in the case of the adoption of a great-grandson other considerations may arise which, so far, have not come under judicial discussion, for the genealogical gap between a man and his great-grandson is wide enough to admit of many developments. But, subject to this caution the above rule appears to be sound.

Before pushing it to its logical conclusion in the present case, however, it is advisable to check it with reference to previous decisions on the subject. It will be found that it gains in strength by the process. Only the decisions of the High Court of Bombay, and of their Lordships of the Privy Council in appeal therefrom, need be discussed, as only the special rights of widows in Maharashtra are being considered. In *Vasudeo* v. *Ramchandra* (12) a grandson was adopted to the last male holder but the estate had previously vested in the daughters of the last male holder. The adoption was held to be invalid, and a similar decision would have been reached by an application of the principle as stated in the preceding paragraph of the judgment. In *Payapa Akkapa Patel* v. *Appanna* (13) the adopted son became grandson to the last male holder of the estate and the adoption was held to be valid. In *Datto Govind* v. *Pandurang Vinayak* (14) the adopted son was nephew to the last male holder, and the adoption was held not to be valid; and the adoption would not have been supported by the above principle. In *Dattatraya Bhimrao* v. *Gangabai* (15) the adopted son became grandson to the last male holder, and his adoption was held to be invalid; it would have been held to be valid under the above principle. In *Yeknath Narayan* v. *Laxmibai* (15) the adopted son became grandnephew to the last male holder, and his adoption was declared to be invalid—as it would have been under the above principle. A few more instances from the Bombay Presidency in which the rule now advanced would have been applicable will be found in *Chandra* v. *Gojara Bai* (2), *Shri Dharnidhar* v. *Chinto* (4), *Babu Anaji* v. *Ratnoji Krishnarav* (7) and *Ram Krishna* v. *Shamrao* (5). In all of these the application of the rule would have led to the result which the learned Judges of the Bombay High Court reached by varying lines of reasoning, based on previous decisions. Indeed the only authority of that High Court cited to us which is contrary to the rule is that given in *Dattatraya Bhimrao* v. *Gangabai* (15) and that is an *obiter dictum* not governing the decision. The decision in *Lakshmibai* v. *Vishnu Vasudev* (6) which was affirmed by the Lordships of the Privy Council in *Bachoo* v. *Mankorebai* (8) is not a case in point, as the adoption there was made at the express direction of the widow's husband. The rule that is now advanced is confined to adoption by a widow without her husband's consent.

In the result, therefore, the principle is in consonance with all the rulings of the Bombay High Court, except one, namely, *Dattatraya Bhimrao* v. *Gangabai* (15) and it is noteworthy that though the adoption of a grandson was here held *obiter* to be invalid, a precisely similar adoption was held to be valid in *Payapa Akkapa Patel* v. *Appanna* (13). Similar considerations apply to other published judgments on the point, and it appears that the adoption of this principle as a general guide would leave nearly all previous decisions unaltered, and would reconcile many apparently conflicting rulings and lines of argument.

I consider it should be acted upon in the present case, and am of opinion that as Januji died in exclusive possession of his estate, and as his estate vested directly in Saraswati Bai, her adoption of Deorao as a son to her husband Venkat Rao made him an heir to Januji's estate. The appeal should be dismissed, and the appellants should pay costs of all parties.

Hallifax, A. J. C.—*(October 21, 1926).*—I have been permitted to read the draft of the judgment which my learned brother proposes to deliver in this case, and I agree in the conclusion that Deorao, on his adoption to Venkat Rao by his

widow Saraswati Bai, became among other things the grandson of Venkat Rao's father Januji for all purposes, including the ownership of Januji's property then held by Saraswati Bai. The reasons for this conclusion, however, seem to me simple and capable of fairly concise statement; we can reach it by a line of reasoning from unquestionable principles of Hindu Law which leaves no room for exceptions, most of the rules described as exceptions by one side or the other in this case or so treated in the many judgments that have been cited being merely necessary consequences of those principles, and the remaining few which conflict with them being proved unsound by doing so.

There is no possible distinction between the validity of an adoption for spiritual purposes and its validity for temporal purposes, or between its validity for any one purpose and its validity for any other. Under the Hindu Law if an adoption is valid at all it is valid entirely, and a person validly adopted becomes for all purposes, spiritual or temporal, the natural son of the person by or to whom he is adopted; on the day of his adoption he ceases to exist as the son of his natural father and comes into existence as the son of his adoptive father.

In the case of *Yadao* v. *Namdeo* (1) their Lordships of the Privy Council said: "There does not appear to their Lordships to be any sound reason why...the Hindu Law as to the power of a Hindu widow...to adopt a son...should depend on the question as to whether her husband had died as a separated Hindu, or as an unseparated Hindu, or on the question as to whether the property which was vested in her when she made the adoption was or was not vested in her as his heir. If it was her religious duty to adopt a son to her husband, that duty would be the same in either case, although possibly the right of the adopted son to the property vested in the widow might be different." When a valid adoption has been made the only question that arises is that of the rights accruing to a son of the person by or to whom it was made who came into existence on the day it was made.

In examining the question of the effect on property of a valid adoption by a Hindu widow, some confusion of thought not seldom arises from regarding a son adopted by a widow as in exactly the same position as a posthumous son of her husband. There is a difference, but only in the point of time at which each comes into existence. A real posthumous son comes into existence at the time of his conception, that is to say, he was actually in existence in embryo before his father's death, though his sex or perhaps even his existence was then unknown. The fiction of adoption cannot possibly be strained to the extent of regarding a son adopted by a widow as in inchoate existence in her husband's mind or her own mind, as the posthumous son was in her womb, at or before the death of her husband; such a son comes into existence as a son on the day on which he is adopted and no sooner.

The only other matter to be borne in mind in this connection is that, when a widow adopts to her husband or inherits his property as a *gotraja sapinda* she does so because she is "half the body" of her husband, not because she is related to him by marriage. Now, nobody can inherit property from his father which did not belong to his father at or after the beginning of his own existence. But the property inherited by a widow from her husband or as a *gotraja sapinda* is still in the possession and ownership of her husband, that is in that of the half of his body that she is. It, therefore, passes to her husband's son when he comes into existence by her adoption.

That fairly simple conception explains all the other rules that have been formulated on this matter. When a widow is a member of a co-parcenary, she is entitled to maintenance in her own right as a widow; she is not holding her husband's share as half his body, as that has already passed to the surviving members of the family. When, therefore, a widow in that position makes a valid adoption there is nothing belonging to her husband which the son can take, though, of course, there is nothing to prevent the other members of the family from giving him the share that once belonged to his father.

That is what is meant by the statement frequently made, of which the inaccuracy is pointed out in the passage quoted above from *Yadao* v. *Namdeo* (1) that a widow in a joint family cannot make a valid adoption without the consent of the co-parceners or of her husband's father. She requires only the consent of her husband, express

or implied, and an adoption made with that consent is valid for all purposes and in all its effects, but the accrual to the person adopted of an interest in his father's share in the family property is not one of those effects, because his father no longer holds it, either in his own full person or in "half his body."

It is for the same reason that an adoption by a widow cannot divest an estate that has already vested by inheritance in another person, her husband no longer owns it, even through her, when his son comes into existence. But here again the consent of the person in whom the estate has already vested passes it back to the person adopted, who would have inherited it if he had come into existence earlier, though the absence of that consent cannot make the adoption less valid and effectual; the giving of the consent merely adds an effect which the adoption would not have without it. As for reversionary heirs, their consent is not only no more necessary for the validity of the adoption than that of any of the other persons mentioned but also it is obviously unnecessary for the passing to the adopted son of property in which they have no more than an expectant interest.

The rulings of the Bombay High Court on which the learned Pleader for the appellant mainly relied in argument were those in *Datto Govind* v. *Pandurang Vinayak* (14), *Dattatraya Bhimrao* v. *Gangabai* (15) and *Yeknath Narayan* v. *Laxmibai* (16). In the first of these cases it was held that a Hindu widow who succeeds to an estate not her husband's but as *gotraja sapinda* of the last male-holder and in consequence of the absence of nearer heirs, cannot make a valid adoption. It has been shown in the extract already quoted from the judgment in *Yadao* v. *Namdeo* (1) that the adoption could not be invalid for the reason stated.

In each of the two other judgments mentioned the discussion of the question with which we are concerned was begun after it had been found and stated that it did not arise in the case at all. In *Dattatraya Bhimrao* v. *Gangabai* (15) Mr. Justice Shah found as a fact that the alleged adoption of the 1st defendant, which was the adoption in question, never took place, and then went on to say: "Strictly speaking the question of the validity of the adoption of defendant No. 1 does not arise. But in view of the argument on the question it seems to me to be desirable to decide that question. And in any case its invalidity, if established, could afford an additional ground for ignoring the adoption." The learned Judge then went on to hold that the widow who was alleged to have made the adoption, but had not made it, "could not adopt to her husband so as to affect the devolution of the estate inherited by her as a *gotraja sapinda*." This appears to be based solely on the authority of previous decisions of the Court, particularly that in *Datto Govind* v. *Pandurang Vinayak* (14), the case last mentioned.

Similarly in *Yeknath Narayan* v. *Laxmibai* (16) the learned Judges found that Narayan, the husband of the widow who made the adoption, survived his brother Ramchandra and was, therefore, the last male owner of the property in dispute, and then said: "Our finding that Narayan died last is sufficient to dispose of the case." The subsequent discussion of an imaginary case built on the hypothesis of Ramchandra having survived Narayan ends in the decision that a widow who inherits property as a *gotraja sapinda* has no power to adopt to her own husband, and any adoption made by her is invalid and will not affect the rights of subsequent reversioners.

Taken literally, the decision in each of these cases of the question that did not arise, like that in the first of the three, where it did, could hardly be supported, even if it had not been shown to be wrong in the passage quoted above from the judgment of the Privy Council in *Yadao* v. *Namdeo* (1). Neither the power of a widow to adopt nor the validity of an adoption made by her could possibly be affected by her inheritance of property before or after her husband's death. If we take the decision as meaning that such an adoption, though valid, does not include among its effects any change in the devolution of the property held by the widow so as to affect the rights of the reversioners, it seems equally difficult to accept them, as the reversioners have no rights but merely a hope of acquiring rights in the future.

JUDGMENT.—In accordance with the separate opinions delivered, the appeal will be dismissed and the appellants will be ordered to pay all the costs.

G. R. D.

A. N. A. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

EXECUTION SECOND CIVIL APPEAL No. 146 OF 1926.

November 17, 1926.

Present:—Mr. Justice Iqbal Ahmad.

BALADIN—OBJECTOR—APPELLANT

versus

LAKHAN SINGH—OPPOSITE PARTY—RESPONDENT.

C. P. C. (Act V of 1908), s. 60 (c)—House belonging to agriculturist—Exemption from attachment—Actual residence, whether necessary—House in ruins, whether exempt from attachment—'Building', 'occupation', meaning of.

A house of an agriculturist which is in ruins is not exempt from attachment under s. 60 (*c*), C. P. C., inasmuch as the word 'building' can never be used with reference to a 'house in ruins'. [p. 376, col. 2.]

Obiter.—In order that a house or other building belonging to an agriculturist may be exempt from attachment under s. 60 (*c*), C. P. C., it is not necessary that it should be actually used by the agriculturist for residence. It is enough if it is used for some purposes connected with agriculture. 'Occupation' in s. 60 (*c*) does not necessarily mean 'residence' only. [p. 376, cols. 1 & 2.]

Second appeal from a decree of the District Judge, Jhansi, dated the 20th of October, 1925.

Dr. *K. N. Katju*, for the Appellant.

Dr. *N. C. Vaish*, for the Respondent.

JUDGMENT.—In execution of a simple money-decree a certain house in ruins was sought to be attached and sold by the decree-holder who is the respondent before me. An objection to the attachment was taken on behalf of the judgment-debtor-appellant that the so called house sought to be attached was in his occupation as an agriculturist and as such was not liable to attachment and sale in execution of the decree held by the respondent. This objection has been overruled by both the Courts below; hence this second appeal by the judgment-debtor.

The first Court held that the house is in a very dilapidated condition and has no doors, and the roof has fallen down and that the house is not used for residence. This finding and decision has been affirmed by the lower Appellate Court.

In appeal before me it is argued that the mere faet that the judgment-debtor did not reside in the house was no reason for overruling the objection taken by him inasmuch as, if it was used by him for storing his agricultural produce, tying cattle and keeping his impliments of husbandary etc., even then the house was not liable to attachment and sale in execution of the decree. I agree that it is not necessary for the application of s. 60 (1) (*c*) of the C. P. C., that the house must be actually used for residence by an agriculturist; all that is necessary for the application of that sub-clause is that the house or other building must belong to an agriculturist and be in his occupation and as such. As held in the case of *Bhanja Lal* v. *D. B. Ballabha Dass* (1) it is not necessary that the house or other building should be an actual dwelling house. It is enough if it is used by him for some purposes connec'ed with agriculture. In short the word 'occupation' in cl. (*c*) does not necessarily mean 'residence' only. But it seems to me that the decisions of the Courts below can be supported on yet another ground. On the findings arrived at by the first Court and not disturbed by the lower Appellate Court, it must be taken that the so-called house is now in ruins and there are no doors in it and there is no roof. Such a structure cannot without straining the language be styled a house. Therefore, unless it can be called a building, s. 60 (1) (*c*) will have no application. In the case of *Moir* v. *Williams* (2) it was observed that the expression 'building' in its ordinary sense "is an enclosure of brick or stone work covered in by a roof." True it is that in that case the word 'building' as used in certain Acts of Parliament had to be construed but in so doing the ordinary meaning of the word 'building' has to be considered. I have referred to Stroud's Judicial Dictionary and I find that in no case has the word 'building' been used with reference to a house in ruins that is a *khandhal*, as is the structure in the present case. For these reasons I hold that the judgment-debtor was not entitled to the protection afforded by s. 60 (1) (*c*), C. P. C.

Apart from all that I have said, it appears to me that the judgment-debtor has no case on the merits. I am informed by the learned Counsel for the appellant that there is evidence on the record to show that the house was in occupation of the judgment-debtor and as such was not liable to sale in execution of the decree held by the respondent. I in the exercise of the powers vested in me by s. 103, C. P. C., can go into the evidence on the record in order to satisfy myself as to

(1) 51 Ind. Cas. 129; 15 N. L. R. 83.

(2) (1892) 1 Q. B. 264; 61 L. J. M. C. 33; 66 L. T. 215; 40 W. R. 63; 56 J. P. 197.

whether or not the so-called house or building was in the occupation of the judgment-debtor. I have gone through the evidence led by the judgment-debtor to substantiate his objections, and I have no hesitation in holding that the Munsif was perfectly right in disbelieving that evidence. The statements of the witnesses produced by the judgment-debtor who deposed that the judgment-debtor was actually living in the house were entirely unworthy of belief and were contradicted by the statement of the guardian *ad litem* of the judgment-debtor. The allegation that the house was used for storing grain obviously could not be believed in view of the report of the Commissioner that there was no roof over the house.

For the reasons given above I am of opinion that the Courts below were right in rejecting the objections filed by the judgment-debtor. The appeal is dismissed with costs.

A. N. A. *Appeal dismissed.*

MADRAS HIGH COURT.

ORIGINAL CIVIL SUIT No. 170 OF 1923.

January 12, 1926.

Present:—Justice Sir Kumarasami Sastri, KT.

NARAYANA SAH—PLAINTIFF

versus

SANKARA SAH AND OTHERS—DEFENDANTS.

Hindu Law—Joint family—Partition—Separation of member of one branch—Subsequent partition amongst remaining members—Share taken off, whether to be taken into account—Family business—Liability of members—Mesne profits—Notice.

It is a recognised principle of Hindu Law that in the case of a joint family consisting of more branches than one, the principle of survivorship and the principle of representation in each branch cannot affect the rights of the other branches and that it is only in the case of one branch becoming entirely extinct that the other branches can get any advantage by survivorship. [p. 379, col. 2.]

Where, therefore, there is a joint family consisting of more branches than one and a member of one of the branches separates himself and is given his share, that share should be taken into account in computing the shares to be allotted on a subsequent partition between the other branches. [p 379, col. 1.]

Manjanatha Shanabhaga v. *Narayana Shanabhaga* (1), followed.

Pranjivandas Shivlal v. *Ichharam Vijbhukhandas* (2), not followed

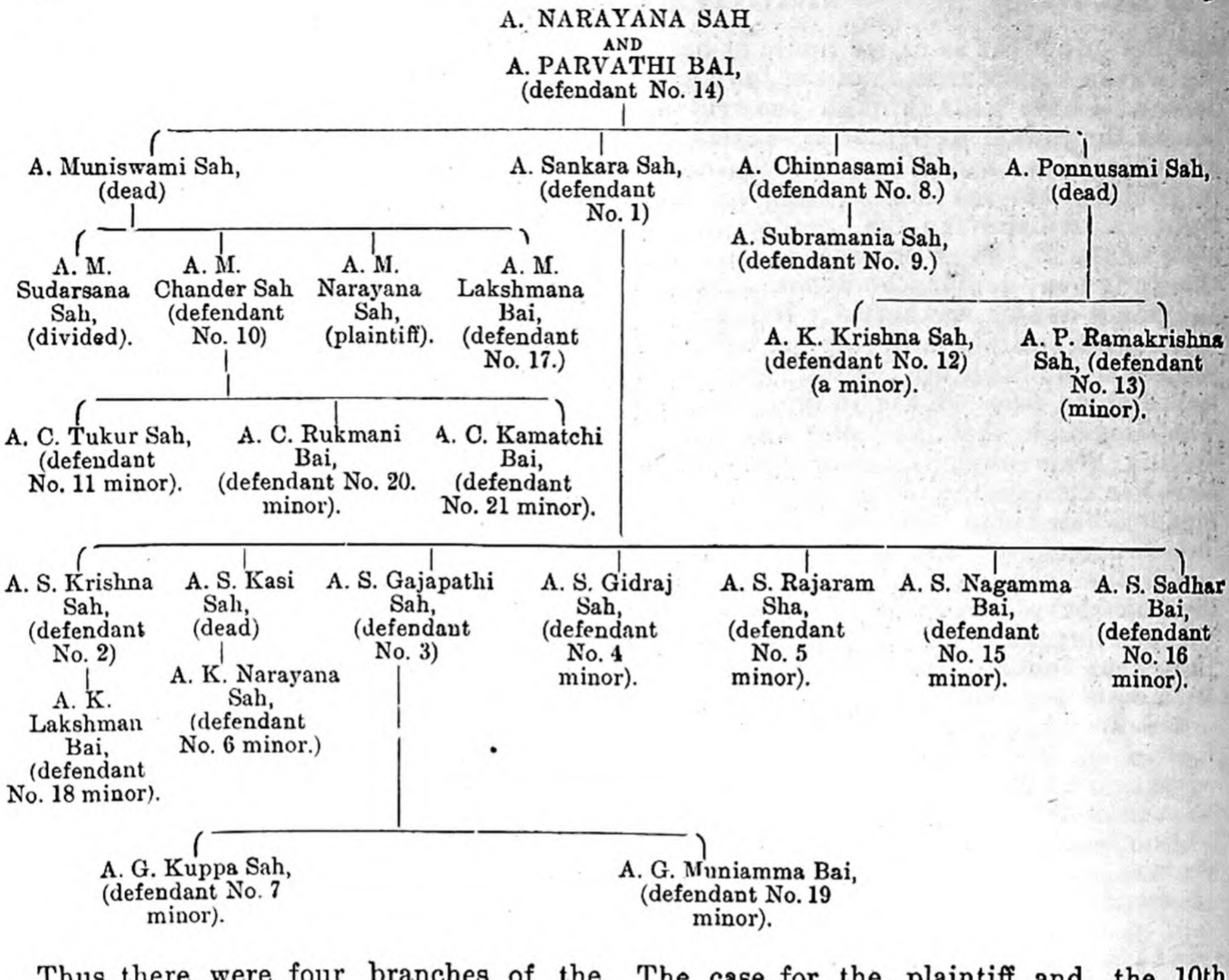
In the case of a joint Hindu family, it is not open to a member to carry on a new venture so as to make his other co-parceners liable for any loss in that venture. But where a family lives by entering into contracts and making profits therefrom, it cannot be said that because a contract entered into at one stage is a new venture, in the sense that such a contract was not taken up before, it makes the contract a new venture in the sense that the other members are not liable. The question often is the difference in degree or the difference in kind, and so long as the business is a business which is similar in nature to those carried on before, it cannot be said that the business is a new venture which cannot bind the other members of the family. [p. 380, col. 2.]

A member of a joint Hindu family who claims his share of family properties in a suit for partition is not entitled to mesne profits for any period prior to the date of his notice in which he calls upon the manager to effect a partition. [p. 381, col. 2.]

Mr. *N. Rajagopalan*, for the Plaintiff.

Messrs. *T. L. Venkatarama Iyer* and *K. Rajah Iyer*, for the Defendants.

JUDGMENT.—This is a suit by the plaintiff for a partition of joint family properties, and for the delivery of his share. One Munisami Sah, Sankara Sah (1st defendant), Chinnasami Sah and Ponnusami Sah were four brothers. The 1st defendant is one of the above four who is alive. Munisami Sah had three sons and a daughter. The eldest son Sudarsana Sah filed C. S. No. 63 of 1910, got his share, and got himself divided from the family. The decree in that suit is marked as Ex. A. The second son Chender Sah is the 10th defendant. He has a son and two daughters who are respectively the 11th, 20th and 21st defendants. The third son Narayana Sah is the plaintiff in this suit and the daughter Lakhshmi Bai is the 17th defendant. Sankara Sah, the first defendant, has five sons and two daughters. Krishna Sah the eldest son, is the 2nd defendant and he has a minor daughter who is the 18th defendant. The second son Kasi Sah is dead and the 6th defendant is his minor son. The third son Gajapathi Sah is the 3rd defendant and he has a son who is the 7th defendant and a daughter who is the 19th defendant. The fourth son (Gidraj Sah) is the 4th defendant. The 5th son Rajaram Sah is the 5th defendant. The two daughters are the 15th and 16th defendants. Chinnasami Sah, a brother of the 1st defendant, is the 8th defendant and his son is the 9th defendant. Ponnusami Sah, the last brother, died leaving two sons Krishna Sah and Ramakrishna Sah who are the 12th and 13th defendants.



Thus there were four branches of the family and the relationship is not disputed, nor is it disputed that there are joint family properties in respect of which a partition is necessary. The plaintiff alleges that he is entitled to $\frac{1}{8}$th share in the properties whereas the contesting defendants in the suit namely, the other two branches of the family and their descendants, state that the plaintiff is only entitled to 1/12th share as Sudarsana Sah whom I have already referred to got his 1/12th share and became divided from the family and that it should bo taken into account in this partition.

One of the questions to be decided is what is the share of the plaintiff and incidentally also what is the share of the 10th defendant who supports the plaintiff. Another question raised in the suit is whether the contract business carried on by the 1st defendant with the Corporation of Madras is joint family business or the separate business of the first defendant.

The case for the plaintiff and the 10th defendant is that it is the separate business of the 1st defendant while the case of the other defendants is that it is joint family business which the 1st defendant carried on as the head and managing member of the family. There are allegations made in the plaint of waste and mismanagement, but it is unnecessary to consider those allegations as no evidence was let in nor were any arguments addressed on the point as to how far the 1st defendant is liable for any waste or mismanagement. The next question is as regards the rights of the plaintiff and the 10th defendant to mesne profits. Notice was given in the year 1922 by the 10th defendant claiming a share and he would *prima facie* be entitled to mesne profits from the date of notice, but he claims mesne profits two years earlier on the ground that he was making oral demands for partition which were not complied with.

Three questions arise for determination in this suit, *viz.*, (1) what is the share

which the plaintiff is entitled to? (2) Whether the contract business carried on by the 1st defendant with the Corporation of Madras is joint family business or the separate business of the 1st defendant in which the plaintiff and the 10th defendant have no interest and are not liable for any loss? and (3) whether the 10th defendant is entitled to mesne profits for any period earlier than the date of his notice *viz.*, 7th November, 1922?

As regards the shares to which the parties are entitled the first question is whether where there is a joint family consisting of more branches than one and a member of one of the branches separates himself and is given his share that share should be taken into account on a partition between the other branches This question has been considered and decided by the Madras High Court in *Manjanatha Shanabhaga* v. *Narayana Shanabhaga* (1) where Innes and Muthusami Iyer, JJ., held that where a joint family in an advanced state of development is broken up by partition regard must be had to the successive vested interests of each branch, and in order to secure equality of shares, division *per stirpes* at each stage when a new branch intervenes is necessary. Muthusami Iyer, J., puts the question to be decided as follows:—

"The question, therefore, arising for determination is whether in cases in which some members of a joint Hindu family separate from it at one time and the others on a subsequent occasion, regard should be had to the share allotted at the first partition in computing the shares to be allotted at the second division,"

and both the learned Judges held in an elaborate judgment that where there are different branches entitled to shares and there has been a partition in which a member of one branch has received his share the remaining members cannot claim their shares ignoring the share already given to the member who has separated himself and claim equality as regards partition of the other branches. This decision so far as the Madras High Court is concerned has not been dissented from and seems to me to be equitable. As is pointed out in that case if there are two brothers one of whom has five sons and the other only one son, and if out of the five sons four sons get their share and separate themselves from the joint family it will be equitable to divide the remainining property equally between the two branches; namely, the undivided son of the first branch and the one son of the second branch ignoring the fact that the other four brothers of the first branch had received their shares and separated themselves from the joint family. It is a recognised principle of Hindu Law that in the case of a joint family consisting of more branches than one the principle of survivorship and the principle of representation in each branch cannot affect the rights of the other branches and that it is only in the case of one branch being entirely extinct that the other branches get any advantage by survivorship. It, therefore, stands to reason that where there is a partition effected between the members of one branch and one of such members goes out, it ought not to affect the vested rights of the other members to their shares in the joint family property; and to give effect to the contention of the plaintiff in this case, namely, that the separation of Sudarsana Sah of the first branch from the joint family makes no difference so far as the shares of the other members are concerned would be virtually to deprive the other members of the joint family of their vested rights to their specific shares, because of something which affects the members of the other branch. I am unable to agree with the view taken in *Pranjivandas Shivlal* v. *Ichharam Vijbhukhandas* (2) as I think that the view taken in that case would really work hardship on the other branches of the joint family. It has now been settled that a member of a joint family may separate leaving the other members as joint and though in the case of a joint family which consists only of sons of one father there may be no difficulty the hardship pointed out in *Manjanatha Shanabhaga* v. *Narayana Shanabhaga* (1) as regards cases where the family is in an advanced state of development and where there are several members is, I think, real. I do not see sufficient grounds for not following the decision in *Manjanath Shanabhaga* v. *Naranaya Shanabhaga* (1). I think this is one of the cases where the principle of *per stirpes* should be applied and it will cause a great deal of hardship and confusion if the ruling in *Manjanatha Shanabhaga* v. *Narayana Shanabhaga* (1) which is in my view consonant with equit-

(1) 5 M. 362; 6 Ind. Jur. 518; 2 Ind. Dec. (N. S.) 252.

(2) 30 Ind. Cas. 918; 39 B. 731; 17 Bom. L. R. 712.

able principles and which has been treated as good law for several years and partition effected on that footing is not followed.

I am, therefore, of opinion that the plaintiff and the 10th defendant are each entitled to 1/12th share.

The next question is as regards the contract business carried on by the 1st defendant with the Corporation of Madras. The evidence of the 1st defendant is that the family is a trading family that both his father and grandfather were engaged in contract work and that in 1910 owing to there being no contracts in hand, he entered into the contract with the Corporation. He says that the immediate occasion for entering into this contract with the Corporation was that one Chockalinga Naicker, who owed money to the joint family, had entered into a contract with the Corporation which he was not able to carry out and he suggested that this family may take over this contract and also the materials which he had collected for the purpose of this contract and that he (the 1st defendant) entered into this contract with the Corporation and continued to do the work from 1910 to 1922. He says that even now there is some contract with the Corporation. He says that the adult members of the family, defendants Nos. 8 and 10, were actually attending to this business, that no objection was taken by any of them till notices passed in 1922 regarding the carrying on of this business. The 10th defendant who is an undivided brother of the plaintiff admits that he was looking after this business from 1910 onwards but states that he did so thinking that it was 1st defendant's separate business and that he did so at the instance of the first defendant who asked him to attend to this business. So far as the 8th defendant is concerned, he in his written statement admits that it is a joint family business and the evidence is that both the 8th and 10th defendants were taking a prominent part in the management of this business. It is not disputed that both the father and the grandfather of the 1st defendant were carrying on contract work. It is admitted that they were carrying on trade in silk thread and lametta and that they were carrying on contract business with the Army Clothing Department. In the plaint filed by Sudarsana Sah in 1910, he, after referring to the contract with the Army Clothing Department, refers to several other contracts, which the parties then took up and I have no doubt that the family was a trading family, one of the important branches of activity being the taking up of contracts. It has, no doubt, been now settled that in the case of a joint Hindu family it is not open to a member to carry on a new venture so as to make his other co-parceners liable for any loss in that venture. But it can hardly be said on the evidence before me in this case that the contract with the Corporation was a new venture in that sense. No doubt, where a family lives by entering into contracts and making profits therefrom, it cannot be said that because a contract entered into at one stage is a new venture in the sense that such a contract was not taken up before, it makes the contract a new venture in the sense that the other members are not liable. The question often is the difference in degree or the difference in kind, and so long as the business is a business which is similar in nature it cannot be said that the business is a new venture which could not bind the other members of the family. In this case there is the further fact that joint family funds were utilised without any objection for the performance of this contract with the Corporation.

The main ground on which it is sought to prove that this contract is not binding on the plaintiff and the 10th defendant is that the 1st defendant when he began this business opened a new account called "Thundu Kanakku" with the firm of R. M. M. S. T. and that moneys were drawn from that firm for the purpose of this contract business. It is also pointed out that the 1st defendant in the statement of account filed by him in the suit filed by Sudarsana Sah in 1910 says that he is a debtor to the family to the extent of Rs. 9,000 which represents the value of the materials that Chockalinga Naicker gave to the family. It is also pointed out that a separate account was kept as regards this contract business. The 1st defendant says that he kept a separate account because there were partners in this contract business, that originally it was intended to take Chokalinga Naicker as a partner and work this business, but that Chokalinga Naicker not being satisfactory the idea was given up, that subsequently there were two partners Krishnamachari and Subramania Iyer, that the business was an extensive one with partners

and that a separate account was kept. The 1st defendant says that moneys drawn under 'Thundu Kanakku' were utilised for joint family business slso and he points out an entry where Rs. 1,000 drawn under the 'Thundu Kanakku' was utilised for lametta business. He also states that he did not keep the moneys he got from this contract business separate from the other moneys and that all the moneys were indiscriminately utilised for joint family purposes. Having regard to the fact that the adult members of the family were working in this contract business without any objection from 1910 onwards and also having regard to the fact that the family was a trading family, one of the important branches of their activity being contract business, and also having regard to the fact that the 1st defendant was not keeping a separate account of the profits derived from this contract business, I do not think I can hold that the contract business entered into by the 1st defendant with the Corporation of Madras was a separate contract entered into by the 1st defendant in which the plaintiff and the 10th defendant had no interest.

The next question is as regards the mesne profits claimed by the 10th defendant. His case is that two years before he gave notice to the 1st defendant and during his absence in Conjeevaram the lock of the room in which the materials of the Army Clothing Department had been kept was broken open by the 1st defendant, that since then there were misunderstandings and that he was living separately although he admits that he was attending to the work. The 1st defendant denies that there were any misunderstandings in connection with the breaking open of the lock. He states that in that room the surplus stock in respect of the Army Clothing Contract was kept which was being damaged by being locked up, that he got a purchaser from Rangoon in respect of the materials that were lying idle there, that as the 10th defendant was absent and as the purchaser was going back to Rangoon he opened the lock and that it did not give rise to any misunderstanding between the parties. The evidence of the 1st defendant is supported by the evidence of Krisnna Sah who is a respectable witness and who admittedly was one of the persons who mediated between the 1st and 10th defendants. He states that the first defendant was ready to give a share to the 10th defendant, that there was nothing said about any quarrels before 1922 and that there was no complaint of breaking open the lock as giving rise to misunderstandings between the parties. The 10th defendant says that Dr. Venkatasami and one Raghul Sah mediated but they are not called. On the evidence I do not think I can hold that the 10th defendant is entitled to mesne profits for any period prior to the date of his notice in which he called upon the 1st defendant to effect a partition.

There will, therefore, be a decree declaring that the plaintiff and the 10th defendant are each entitled to 1/12th share in the joint family properties, that the contract business carried on by the 1st defendant with the Corporation of Madras was a joint family business in which the parties are entitled to profits and liable for losses in proportion to the shares to which they are entitled in the joint family properties, that the 10th defendant is entitled to mesne profits from the date of his notice, *viz.*, 7th November, 1922, and that the plaintiff is entitled to mesne profits from the date of the plaint. It will also be declared that the 1st defendant is not liable for any sum claimed in respect of waste or mismanagement alleged in the plaint. There will be a preliminary decree in the above terms. The suit will be referred to the Official Referee for taking an account of the joint family properties moveable and immoveable of the debts due to and by the joint family and of the profits and losses in respect of the various contracts now in hand and on such accounts being taken, there will be a final decree for partition giving to the plaintiff and the 10th defendant a 1/12th share each. The other defendants do not ask for any share.

As regards costs the plaintiff and the 10th defendant will be entitled to take their costs incurred up to this date out of the estate and further provision will be made for the costs of the reference when the final decree is passed.

V. N. V. *Decree for partition.*

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 373 OF 1923.
November 9, 1926.
Present:—Mr. Justice Dalal and
Mr. Justice Pullan.
CHOTKANU LAL—PLAINTIFF—APPELLANT
versus
GANGA SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Alienation for purpose of raising money in order to satisfy pre-emption decree—Legal necessity.

Where it is necessary to obtain a decree for pre-emption in order to safeguard the interests of the pre-emptor's family in ancestral property, money raised for the purpose of satisfying the decree for pre-emption must be regarded as having been raised for family necessity. [p. 383, col. 1.]

First appeal from a decree of the Subordinate Judge, Shahjahanpur, dated the 20th July, 1923.

Messrs. *P. L. Banerji, Harnandan Prasad* and *Hazari Lal Kapoor*, for the Appellant.

Mr. *Sarkar Bahadur Johari*, for the Respondents.

JUDGMENT.—The plaintiff's suit for sale against a Hindu mortgagor and his descendants, was dismissed on the ground that the money was not borrowed for legal necessity. In the hypothecation bond the recital was that money was wanted to pay a pre-emption decree and to defray other necessary expenses. It is in evidence that on the same date the 16th July, 1910, Rs. 2,000 out of the consideration of Rs. 3,000, was paid into Court which passed the pre-emption decree and the pre-empted property was acquired by the mortgagor Ganga Singh. As regards the balance of the consideration we agree with the lower Court that there is no satisfactory evidence to prove legal necessity thereof. The learned Counsel for the plaintiff urged that money was wanted for the payment of revenue and to redeem family ornaments. The evidence, however, has not been believed by the lower Court and we are not prepared to disagree when we ourselves have not had an opportunity of seeing the witnesses.

The pre-empted property along with his own equal share in the same village was mortgaged with possession by Ganga Singh to one Meherban Singh for Rs. 12,500 in 1911. Subsequently Ganga Singh's sons sued Meherban Singh to have the deed cancelled and in the plaint of that suit the plaintiff of that suit, Hardeo Singh major and his minor brother and sons, claimed this pre-empted property as joint ancestral property. It is clear that Hardeo Singh thereby recognised the necessity for the pre-emption of the property for which purpose Ganga Singh borrowed the sum of Rs. 2,000 from the plaintiff of this suit. It will also be noticed that the property which Ganga Singh purchased for Rs. 2,000 was mortgaged with possession for more than three times that amount, *i. e.*, Rs. 6,250.

The learned Judge of the lower Court held that money required for the payment of pre-emption decree could not be said to have been borrowed for legal necessity of the family. He relied on the Bench ruling in the case of *Shankar Sahi* v. *Baichu Ram* (1). The head-note says: "Ordinarily a Hindu father cannot encumber joint ancestral property to acquire the necessary fund to pre-empt other property." The word 'ordinarily' is explained by the learned Judges who were of opinion that the act of purchase must be a defensive act, something undertaken for the protection of the estate already in possession. Quoting certain observations of their Lordships of the Privy Council in the case of *Palaniappa Chetty* v. *Deivasikamony Pandara Sannadhi* (2), their Lordships say that all the acts contemplated by their Lordships of the Privy Council were in the nature of a shield, that is, involving an expense which arose and which had to be met in order to keep alive the whole or some portion of the ancestral property. We have read the evidence in the case and we are of opinion that the present case satisfies the conditions laid down in the ruling quoted above. The plaintiff stated that Meherban Singh son of Ram Singh was a very influential person and for this reason, Ganga Singh and his family were afraid that if Meherban Singh became a co-sharer of half the property of the village there would be litigation. This statement was supported by the testimony of a Thakur of the mortgagor's brotherhood, Hira Singh and a former *karinda* of the mortgagor Janki Prasad. They both stated that Ganga Singh and Meherban Singh were not on good terms, and there was an apprehension of a dispute in future

(1) 86 Ind. Cas 769; 23 A. L. J. 204; L. R. 6 A. 214 Civ.; A. I. R. 1925 All. 333; 47 A. 381.

(2) 39 Ind. Cas. 722; 15 A. L. J. 485; 21 C. W. N. 729; 1 P. L. W. 697; 33 M. L. J. 1; 19 Bom. L. R. 567; 22 M. L. T. 1; (1917) M. W. N. 507; 26 C. L. J. 153; 40 M. 709; 6 L. W. 222; 44 I. A. 147 (P. C.).

and loss to the ancestral property of Ganga Singh if Meherban Singh was permitted to take possession of the other half of the village. When Ganga Singh had the necessity of mortgaging property to pay off debts, he did not mortgage only the pre-empted property or his ancestral property, but mortgaged the entire village to Meherban Singh to avoid disputes in case of his and Meherban Singh becoming co-sharers in the same village. The property which was pre-empted belonged to Ganga Singh's brother, and was sold by that brother to Meherban Singh. No evidence was led on behalf of the defence to contradict the allegation of the plaintiff that pre-emption was necessary to safeguard the interest of the family in the ancestral property. The defendant, Hardeo Singh, was examined as a witness after the plaintiff's evidence was concluded, but he did not contradict the statement made by the plaintiff and his witnesses. He and his witness Mohan Lal deposed falsely that the pre-emption resulted in a loss. Obviously it did not result in a loss because the property which was purchased for Rs. 2,000 was a year later mortgaged for more than three times that amount.

For these reasons we are of opinion that the sum of Rs. 2,000 was borrowed for legal necessity. It was objected that 1 per cent. per month interest with yearly rests was excessive. We do not think that the interest was unusually high or that the manager of the family was imprudent to have borrowed at that rate of interest.

We set aside the decree of the lower Court and decree the plaintiff's suit for sale. The usual decree under O. XXXIV, r. 4 shall be prepared. The principal amount shall be Rs. 2,000 and interest at the bond rate shall run upto six months from to day's date; after that the interest shall stop. The plaintiff shall receive proportionate costs of all the Courts and the defendants shall receive their costs in proportion to plaintiff's failure of the suit.

Z. K. *Decree set aside.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 576 OF 1926.

August 19, 1926.

Present :—Mr. Justice Jackson.

GOGINENI GOPAYYA AND OTHERS—DEFENDANTS—PETITIONERS

versus

MANIKONDA SOBHANADRI—PLAINTIFF—RESPONDENT.

C. P. C. (Act V of 1908), s. 115, O. XXXIX, r. 1 —Temporary mandatory injunction—Balance of convenience—Prima facie *title*—Status quo—*Assumption of jurisdiction, without inquiry—Revision.*

A temporary mandatory injunction pending a suit cannot be passed merely on a balance of convenience, before the Court is satisfied that on the facts before it, there is a probability that the plaintiff is entitled to relief, or that he has a fairly colourable right to the claim he makes. The Court in such a case cannot in terms decline to address itself to any of the issues between the parties to the suit. [p. 384, col. 2.]

It is often a predominant necessity to maintain the *status quo* at the time of the institution of the suit. But there is not the same justification for carrying the principle back to some period anterior to the suit. [*ibid*.]

Where a Court assumes jurisdiction without any judicial inquiry into the facts which would alone give it jurisdiction, the High Court will interfere in revision under s. 115, C. P. C. [*ibid.*]

Petition, under s. 115 of Act V of 1908 and s. 107 of the Government of India Act, praying the High Court to revise the order of the Court of the Subordinate Judge, Bezwada, in Miscellaneous Appeal No. 12 of 1926, preferred against that of the Court of the District Munsif, Nuzwid at Bezwada, in C. M. P. No. 660 of 1926, in O. S. No. 325 of 1926.

Mr. *Ch. Raghava Rao*, for the Appellants.

Mr. *V. Govinda Rajachari*, for the Respondent.

JUDGMENT.—The petitioners seek to revise the order of the Subordinate Judge, Bezwada, in M. A. No. 12 of 1926 dismissing their appeal against the order of the District Munsif of Nuzvid in C. M. P. No. 660 of 1926, by which they have been ordered to remove earth and restore *bunds* upon their lands so as to allow the counter-petitioner to take water to his land by right of the easement which he claims.

The counter-petitioner is claiming this easement both by prescription and as of necessity. There is a channel supplying his land from the main irrigation channel; and the Munsif finds that he has also taken water from the channel now in dispute and he also finds that the balance of convenience is in the counter-petitioners' favour.

The learned Subordinate Judge remarks that the only question which needs consideration in a matter like this is whether the plaintiff has shown that the balance of convenience is on his side and it is quite inopportune at this stage that the Court should try to determine the nature of the right claimed by the plaintiff, whether it is an easement by prescription or an easement of necessity; it is inadvisable that the Court should address itself to any of the matters which are in issue between the parties to the suit.

The lower Courts are mistaken in thinking that the balance of convenience is the only consideration. Probably, in the majority of cases in this Presidency, where a man fills in a channel, the advantage he gains by such addition to his arable land is not commensurate with the disadvantage he causes to any neighbour who has been taking water from the channel. But that is not by itself enough to justify the Court in issuing a mandatory injunction. The neighbour who feels himself aggrieved must show a fairly colourable right to the water before the Court can act; and the Court cannot in terms decline to address itself to any of the issues between the parties to the suit.

The channel in dispute appears from the survey plan originally to have been a drainage channel flowing from west to east past the counter-petitioner's lands which at the time of the survey was dry. Whether he is now claiming by prescription or of necessity, the counter-petitioner must clearly show when his land became wet, and that material fact has not been proved. In these proceedings he relies upon the so-called admission of the petitioner that when the *zemindar* sold the lands, the main supply channel had been cut, therefore, it is argued that the land must have been wet before the transfer and, therefore, there must be an easement of necessity. But the admission must be taken as a whole; "The old channel became useless, by the time the *zemindar* sold the lands. By that time, the main channel and the branch channels had come into existence." If so, there could be no question of an easement of necessity and apart from this statement on the Commissioner's report it is *prima facie* difficult to see how if the main supply to the counter-petitioner's field is direct from the irrigation channel he can say that this minor drainage channel is, or ever has been necessary for his enjoyment. In times of abundance there would be the main channel, and in times of scarcity it has yet to be shown that the drainage channel will continue as a subsidiary source after the main channel has ceased to flow. The learned Subordinate Judge seems to apprehend this difficulty in his fourth paragraph but decides to overlook it because the *status quo ante* must be maintained. It is often a predominant necessity to maintain the *status quo* at the time of the institution of the suit. But there is not the same justification for carrying the principle back to some period anterior to the suit as the Subordinate Judge has done. As a matter of fact it is the present injunction which is disturbing the *status quo*.

The District Munsif was moved under O. XXXIX, r. 1, C. P. C. and apparently acted under that rule, which certainly gives him no jurisdiction; but apart from the question of the appropriate provision under which he could act, I must find that both he and the Subordinate Judge assumed jurisdiction in this matter without any judicial inquiry into the facts which would alone give them jurisdiction. An injunction cannot be passed merely on a balance of convenience before the Court is satisfied that on the facts before it, there is a probability that the plaintiff is entitled to relief. I do not find that such probability has been established and allow this petition with costs. The injunction order is cancelled. Costs to petitioners throughout.

V. N. V. *Order accordingly.*

BOMBAY HIGH COURT.
FULL BENCH.

APPEAL FROM ORDER No. 68 OF 1925.

August 9, 1926.

Present :—Sir Amberson Marten, KT., Chief Justice, Justice Sir Lallubhai Shah, KT., Mr. Justice Fawcett, Mr. Justice Kemp, and Mr. Justice Mirza.

NARAYAN PUTAPA CHANDRAGATGI—APPELLANT

versus

VAIKUNT SUBAYA SONDE—RESPONDENT.

C. P. C. (Act V of 1908), O. XLIII, r. 1 (d), O. IX, r. 13—Ex parte *decree—Order rejecting application to set aside, for failure to fulfil conditions imposed by Court—Appeal.*

An appeal lies from an order rejecting an application for an order to set aside an *ex parte* decree, even when the order is made because the conditions lawfully imposed on the defendants were not complied with. [p. 386, cols. 1 & 2; p. 387, col. 2.]

Fakirgowda Bhimangowda v. *Vishnudas Venkateshdas* (1), overruled.

Jagarnath Sahi v. *Kamta Prashad* (2), approved.

Appeal from an order of the First Class Subordinate Judge at Karwar, rejecting application to set aside a decree made in Original Suit No. 93 of 1925.

ORDER OF REFERENCE TO A FULL BENCH.

Shah and Fawcett, JJ.—(*July 9, 1926*)—In this case an *ex parte* decree was passed. On the application of the defendants to have the *ex parte* decree set aside, the learned First Class Subordinate Judge made the following order:—

"Suit to be restored to file on the applicants or any of them furnishing adequate security for Rs. 3,000 only within one month. Applicants to bear costs of this application."

Apparently the security was not furnished in time. The result was that the learned Judge made the following order on July 18:—

"As security is not furnished in spite of ample opportunity given, the application fails and suit cannot be restored to file. Application is rejected with costs."

From the order rejecting the application with costs, the present appeal is preferred to this Court as from an order under the provisions of O. XLIII, r. 1, cl. (*d*) which allows an appeal from an order under r. 13 of O. IX, rejecting the application for an order to set aside a decree passed *ex parte*.

On behalf of the respondents a preliminary objection has been taken that no appeal lies, and in support of that contention reliance is placed upon *Fakirgowda Bhimangowda* v. *Veshnudas Venkateshdas* (1). In that case it was held that the application not having been rejected on the merits, but having been rejected because the conditions, which were lawfully imposed, were not complied with, no appeal lay against the order rejecting the application.

On behalf of the appellants, it is urged that, under the C. P. C., O. XLIII, r. 1, cl. (*d*), they are entitled to appeal from an order rejecting the application, without reference to and quite apart from the previous steps which might have ultimately led to that order. It is urged that it is only in that way that the reasonableness of the conditions, which may have been imposed in the first instance, can at all be tested in appeal.

We have carefully considered the *ratio decidendi* in *Fakirgowda Bhimangowda* v. *Vishnudas Venkateshdas* (1). That ruling expressly dissents from the contrary view taken in *Jagarnath Sahi* v. *Kamta Prashad* (2). With great respect, we feel a difficulty in accepting the *ratio decidendi* in *Fakirgowda Bhimangowda* v. *Vishnudas Venkateshdas* (1).

Apart from the decisions, it appears to us that it is only if and when the application is finally rejected that the right to appeal arises. It is perfectly true that when first the application is allowed subject to certain conditions stated in the order, that order is not appealable. But, if those conditions for any reasons are not fulfilled and ultimately the order made on the application is rejected under the provisions of the Code, the right to appeal arises. It may be that ordinarily where the conditions laid down in the first instance by the Court, dealing with the application, are found reasonable, the appeal will fail on the merits. But, it is difficult to say that the order rejecting the application finally is not appealable. Taking, as an illustration, an extreme case in which the first order imposes a condition which is clearly unreasonable, the only manner in which the party against whom that order is made can seek to get rid of it is by refusing to comply with the condition and by inviting the order rejecting the application as a consequence of his non-compliance with the condition, so that he could appeal from the order. It is only in that way that he can obtain redress in respect of a condition which *ex hypothesi* is unreasonable. The right of appeal under the Code having been clearly provided, when the application is rejected, it seems to us that the proper view is that an appeal does lie to this Court, and that if the appeal is sought to be supported by objecting to the conditions, if the conditions are reasonable, the appeal would fail on the merits. But it is difficult to see how the right of appeal given by the Legislature could be denied to the appellant on the ground that an order made prior to the order under

(1) 96 Ind. Cas. 321; 28 Bom. L. R 578; 50 B. 326; A. I. R. 1926 Bom. 353.

(2) 23 Ind. Cas. 138; 36 A. 77; 12 A. L. J. 38.

appeal, is an unappealable order, without reading words in cl. (*d*) of r. 1 of O. XLIII which are not there. That is the difficulty which we feel in following the decision which has been relied upon by the respondent in support of the preliminary objection.

We have come to the conclusion that the question whether an appeal lies in this case under the circumstances which have been indicated in this judgment must be referred to a Full Bench. We, accordingly, refer the following question to the Full Bench:—

"Whether an appeal lies from an order rejecting the application for an order to set aside a decree passed *ex parte*, when the order is made because the conditions which were lawfully imposed on the defendants were not complied with?"

Mr. *G. S. Mulgaonkar*, for the Appellant.

Mr. *G. P. Murdeshwar*, for the Respondent.

The reference coming on for hearing before a Full Bench composed of Marten, C. J., Shah, Fawcett, Kemp and Mirza, JJ., their Lordships delivered the following

OPINION.

Marten, C. J.—In our judgment the question submitted to this Full Bench ought to be answered in the affirmative.

The final result of the applicants' application to have the *ex parte* decree set aside was that it was rejected. Whether one arrives at that result by reading into the order of May 30, 1925, an implication that, if the conditions therein mentioned were not satisfied, the application would be rejected; or, whether we take the later order of July 18, 1925, which specifically stated that as the conditions were not satisfied, the application was rejected, I think the practical result is the same. Consequently, in our judgment, there was "an order under r. 13 of O. IX rejecting an application..... for an order to set aside a decree passed *ex parte*" within the meaning of O. XLIII, r. (1) (*d*), and, therefore, an appeal lay under O. XLIII

In effect the order of May 30, 1925, was a conditional order for rejection of the application. This conditional order did not finally set aside the decree. Consequently, at the outset, there was no order "setting aside the decree" within the meaning of O. IX, r. 13. Still less did the Court appoint a day for proceeding with the suit as directed by that rule. Under these circumstances we do not think it necessary to comment on the different practices which seem to prevail in the *mofussil* and on the Original Side of this Court respectively. My brothers Shah and Fawcett tell me that in the *mofussil* it is usual to make two orders, *viz.*, (*a*) a preliminary conditional order like that of May 30; and (*b*) a final order like that of July 18. That, indeed, is the practice pointed out in *Jagarnath Sahi* v. *Kamta Prashad* (2). On the Original Side, the usual order provides that if the applicant does not comply with the conditions therein stated, then his application is to be dismissed and the original *ex parte* decree to stand. In other words, on the Original Side we usually have one order and not two as is the case here. But, whichever course is adopted, in my opinion, it makes no difference in principle.

Accordingly, with great respect we are unable to agree with the decision of the Bench of this Court in *Fakirgowda Bhimangowda* v. *Vishnudas Venkateshdas* (1) and we prefer the result arrived at in *Jagarnath Sahi's case* (2) *viz.*, that an appeal does lie in a case like the present on a final order rejecting the application.

But to avoid any misconception, I may add that though *pro forma* an appeal may lie, still in the vast majority of cases, the appeal will be one of those known as "hopeless," because the conditions imposed by the lower Court will be reasonable ones, and accordingly, if they are not fulfilled, the only result will be that the appeal will be dismissed with costs. It can only, therefore, be in exceptional cases such as those where the lower Court has not exercised its discretion judicially, or where quite unreasonable conditions are imposed, that an appeal of this nature can have any chance of success. Or, again, there may be some such case as in *Jagarnath Sahi* v. *Kamta Prashad* (2) or even (on one construction of the trial Judge's decision) in *Fakirgowda Bhimangowda* v. *Vishnudas Venkateshdas* (1) where the trial Judge forms an erroneous judicial opinion of his powers of imposing or altering conditions under the Code. But, we need not go into that.

In the result, therefore, we arrive at the answer stated in the beginning of my judgment to the question which has been submitted to us.

Shah, J.—I agree.

Fawcett, J.—I agree.

Kemp, J.—I have nothing to add.

Mirza, J.—I agree. Order IX, r. 13 seems to contemplate three classes of orders, *viz.*, (1) an order setting aside the decree; (2) an order setting aside the decree on certain terms; and (3) an order rejecting the application to set aside the decree. (1) and (3) present no difficulty. No appeal would lie from (1). An appeal would lie from (3). In the first instance it would appear that no appeal would lie from (2). It is not a final order in the sense in which (1) and (3) are final orders. It seems to leave the matter in abeyance and contemplates a further step. In effect, it seems to bargain with the applicant that if the applicant would do a certain thing in the manner prescribed the Court would set aside the decree and restore the action to the file; should the applicant fail to carry out the condition imposed, the Court would reject his application to have the decree set aside. It is open to the Court which imposes the condition to withdraw it or to vary or modify it from time to time as it may deem proper. Failure to comply with the condition imposed would not by itself in the absence of a provision in the order to that effect, operate as a rejection of the application to set aside the decree. The Court has to ascertain whether the applicant has carried out the terms imposed on him. On proper cause being shewn, the Court may, at any time prior to the rejection of the application, withdraw the condition it had previously imposed on the applicant or accept any partial performance of it as sufficient, set aside the decree, and restore the suit to the file; the Court may extend the time for complying with the order. Until the application is finally rejected, no right of appeal would accrue to the applicant. The appellant here is aggrieved by the order of the Subordinate Judge passed on July 18, 1925, rejecting his application to set aside the decree passed against him *ex parte*. I take it that he is not directly appealing against the previous order of the Subordinate Judge whereby the decree was to be set aside on the applicant furnishing security for Rs. 3,000 within one month. We are not concerned here with the steps the learned Subordinate Judge took before rejecting the application or the reasons which may have actuated him to reject the application. Those are matters which will be gone into when the appeal is heard on the merits. The question before us at this stage is whether an appeal lies from the order dated July 18, 1925. That order by itself clearly falls under O. XLIII, r. 1, cl. (*d*), of the C. P. C., and is, therefore, appealable. No rule of construction is pointed out whereby it would be permissible to us to construe the order of July 18, 1925, as comprising the steps by which it was arrived at. There is nothing in the language of O. XLIII, r. 1, cl. (*d*), to justify the conclusion that an order of rejection so arrived at is excluded from its operation.

With great respect, I disagree with the decision on this point in *Fakirgowda Bhimangowda* v. *Vishnudas Venkateshdas* (1). With great respect, I agree with the decision in *Jagarnath Sahi* v. *Kamta Prashad* (2).

I answer the question put in the affirmative.

Marten, C. J.—With reference to what my brother Mirza has just stated, I wish to make it clear that, with the concurrence of Pleaders on both sides, the Memorandum of Appeal has been treated as an appeal from the order of July 18, as read with the conditional order of May 30, 1925. Accordingly, my judgment is based on there being an appeal before us in that sense, and on the same meaning being given to the words "an appeal" in the question formally submitted to us. We are not, therefore, dealing solely with an appeal from the order of July 18.

A. N. A. *Answer accordingly.*

RANGOON HIGH COURT.

SECOND CIVIL APPEAL NO. 38 OF 1926.

August 5, 1926.

Present:—Mr. Justice Mya Bu.

MA SHWE YON AND OTHERS—DEFENDANTS—APPELLANTS

versus

MA WAING AND OTHERS—PLAINTIFFS—RESPONDENTS.

Burmese Buddhist Law—Inheritance—Step-son's right to inherit to step-mother—Divorce, effect of—Registration Act (XVI of 1908), s. 17—Partition, deed reciting, admissibility of.

Under Burmese Buddhist Law a step-son is not an heir to his divorced step-mother. [p. 389, col. 1.]

Although a step-child may not ordinarily be called upon to prove maintenance of filial relationship, yet a child who goes away or remains behind with one of the parents on their divorce, must necessarily show

that in spite of the severance, filial relations between it and the other parents had not been broken off or had been resumed. [p. 389, col. 2.]

[Case-law discussed.]

A document which does not of itself create a partition but which merely recites the terms agreed to by the parties relating to the way in which they should take their respective shares in the properties therein mentioned, is not compulsorily registrable. [p. 390, col. 1.]

Man Han v. *V. R. M. A. L. Firm* (11), relied on.

Mr. *Tun Byu*, for the Appellants.

Mr. *S. Ganguli*, for the Respondents.

JUDGMENT.—The facts of the case, which must now be or have been accepted by all the contesting parties in this Court, are these.

U Tha Maung, a Burman Buddhist, had two wives. The first wife was Ma Daung, who died in July 1924. The defendants are her brothers and sisters. During the subsistence of his marriage with Ma Daung, U Tha Maung married the second wife, Ma Waing, the 1st plaintiff, by whom he had a son, Maung Ko Gyi, the 2nd plaintiff. After this marriage, a divorce by mutual consent was effected between U Tha Maung and Ma Daung on the 20th September, 1915, as per Ex. I and since then they became separate. A year or two later U Tha Maung died.

The present dispute relates to the properties of which the said Ma Daung admittedly died possessed. In their amended plaint, the plaintiffs claimed that the said properties were still belonging to the joint estate of U Tha Maung and Ma Daung that, therefore, U Tha Maung's share therein devolved on the 1st plaintiff as his surviving widow and sole heir and that the remainder, namely, Ma Daung's own share, devolved on the 2nd plaintiff, who was Ma Daung's step-son.

The defendants, who are the brothers and sisters of Ma Daung and who would be the rightful heirs to the whole estate if the entire estate belonged to Ma Daung alone and if Ma Daung had died leaving no descendant, contested on the ground that *inter alia* there had been a divorce and partition of property between U Tha Maung and Ma Daung.

The trial Court found that, though there was a divorce, as alleged, there was no partition of property between U Tha Maung and Ma Daung and decreed U Tha Maung's share of what was found to be the joint estate in favour of the 1st plaintiff and Ma Daung's share therein in favour of the nd plaintiff.

On appeal by the defendants, the lower Appellate Court upheld the findings of the trial Court as to divorce and partition of property but held that in view of the divorce between U Tha Maung and Ma Daung, the 2nd plaintiff could not be regarded as Ma Daung's heir. Consequently, the learned District Judge gave what was found to be U Tha Maung's share to the 1st plaintiff, the remainder being decreed in favour of the defendants.

The chief reason for the finding by both the Courts that the joint estate of U Tha Maung and Ma Daung had not been partitioned was that the document, Ex. I, was admissible merely to prove the divorce but inadmissible to prove the partition.

The defendants in coming to this Court on second appeal set out various grounds of appeal most of which attacked the propositions of fact as set out in the opening of this judgment and have not been touched upon by their Counsel in his argument. Their sole and real ground now in short is that the lower Courts failed to appreciate the point of law involved in the question of the alleged partition.

The 2nd plaintiff also has filed a cross-objection against the lower Appellate Court's finding that he was not an heir of Ma Daung. His Counsel relies on the decision of their Lordships of the Privy Council in the case of *Maung Dwe* v. *Khoo Haung Shein* (1). That case deals with the right of the ordinary step-children and step-grandchildren of a deceased person to inherit his state to the exclusion of his collaterals laying down that it is not necessary for the establishment of their right to inherit to prove that they maintained filial relationship with the deceased. The question arising in the present case is quite different. The 2nd plaintiff's father and his step-mother, Ma Daung, had had the marriage-tie between them cut off before the death of the former and this is too important a factor to be left out of consideration. The learned District Judge, who pointed out that there was no authority on the point, arrived at the conclusion that the divorce between U Tha Maung and Ma Daung had cut off the relationship between the 2nd plaintiff and Ma Daung and that, therefore, he could not be her heir. There is no reason why I should dissent

(1) 84 Ind Cas. 899; 3 R. 29; 47 M. L. J. 853; A. I. R. 1925 P. C. 29; 3 Bur. L. J. 340; (1925) M. W. N. 23; 29 C. W. N. 824 (P. C.).

from that conclusion, which has been based on very cogent reasons. In addition I would point out that the case of *Ma Cho Gale* v. *Ma Non Chaw* (2) is very similar to this, the only difference being that in the former the claimant step-child was the child of an inferior wife. This difference makes me reluctant to apply the ruling in that case to the one now before me, though I have very grave doubts that the learned Judges who gave that decision would have come to a different one even if the claimant's mother had the status of a full or superior wife. All that I would like to add is this: though there is no direct authority either in the reported decisions or in the *dhammathats*, an analogy may safely be taken from the law relating to the status of the children of a divorced couple when they have been taken away by either of the parents. From the cases of *Mi Thaik* v. *Mi Tu* (3), *Ma Gywe* v. *Ma Thi Da* (4), *Ma Sein Nyo* v. *Ma Kywe* (5), *Ma Pon* v. *Po Chan* (6) and *Le Maung* v. *Ma Kwe* (7), it may be taken as a well-established rule of Buddhist Law that a child taken away by one of its parents on divorce loses the rights of inheritance as a member of the family of the other parent unless there has been maintenance or revival of filial relationship between it and the latter. In my opinion this rule should apply with much greater force to a case like the one under consideration. There is no evidence at all that there was continuance or revival of filial relationship between the 2nd plaintiff and Ma Daung.

The Counsel for the 2nd plaintiff contends again under the authority of *Maung Dwe* v. *Khoo Haung Shein* (1) that it was not incumbent on a step-child to prove maintenance of filial relationship in order to be entitled to inherit from a step-parent. But if it is borne in mind that upon divorce of the parents a position very analogous to that of adoption arises in regard to the status of their children as pointed out in *Ma Paw* v. *Ma Mon* (8), *Po Cho* v. *Ma Nyein Myat* (9) and *Ma Yi* v. *Ma Gale* (10) it becomes intelligible that although a step-child may not ordinarily be called upon to prove maintenance of filial relationship yet a child who goes away or remains behind with one of the parents on their divorce must necessarily show that, in spite of severance, filial relations between it and the other parent have not been broken off or have been resumed so as to be entitled to inherit in the latter's estate. In my judgment, the 2nd plaintiff's cross-objection must be thrown out.

I now turn to the appellants' case. I fail to see why the appellants, who are in possession of the properties in suit, should be required to prove that they were the absolute properties of Ma Daung. The divorce took place in 1915; since then Ma Daung and U Tha Maung became quite separate and Ma Daung was in possession and enjoyment of the properties till her death. On Ma Daung's death, the 1st respondent applied for Letters of Administration, concealing the fact of the said divorce, to the estate of Ma Daung on the ground that her minor son, the 2nd respondent, was Ma Daung's step-son and heir. She failed to get the Letters of Administration and she as the next friend of the 2nd respondent filed the first plaint in the suit in which too she put up the 2nd respondent as Ma Daung's heir entitled to Ma Daung's effects, as set out in the schedule. It was only about seven weeks later she altered the case to one in which the same properties were described as the joint estate of both U Tha Maung and Ma Daung and claimed to be an heir of U Tha Maung in her own right as his widow, posing the 2nd respondent as the heir of Ma Daung entitled to Ma Daung's undivided share in the same properties. It was most unlikely that the 1st respondent would sleep over her rights to have the joint estate partitioned on U Tha Maung's death, if there was any truth in the allegation that the properties did then belong to both U Tha Maung and Ma Daung. In these circumstances, it would be only fair to the appellants to presume that the properties belonged to Ma Daung and Ma Daung alone after her separation from U Tha Maung unless the contrary be shown by the respondents.

(2) 93 Ind. Cas. 87; 3 R. 521; A. I. R. 1926 Rang. 69.
(3) (1872-92) S. J. 184.
(4) 2 U. B. R. (1892-96) 194.
(5) 2 U. B. R. (1892-96) 159.
(6) 2 U. B. R. (1897-01) 116.
(7) 56 Ind. Cas. 681; 10 L. B. R. 107; 13 Bur. L. T. 3.
(8) 4 L. B. R. 272; 14 Bur. L R. 236.
(9) 4 Ind. Cas. 1029; 5 L. B. R. 133; 3 Bur. L. T. 54.
(10) 19 Ind. Cas. 85; 6 L. B. R. 167; 6 Bur. L. T. 75.

There is Ex. I, which supports the theory of a partition between Ma Daung and U Tha Maung. I have read this document and I find that there is nothing therein which rendered this document to be compulsorily registrable. It sets out the divorce and does not of itself create a partition. It merely mentions the terms agreed to by the parties relating to the way in which they should take their respective shares in the properties therein mentioned. That part of the document may at most be regarded as an agreement to partition the properties in the manner stated. It was treated by the parties as such. Stamp duty was not paid on it as on an instrument of partition. I can see no justification for excluding any part of that document from the evidence in the case. I am fortified in my view by the ruling in *Man Han* v. *V. R. M. A. L. Firm* (11), wherein it was held that "a document which does not of itself create a partition of property but which merely recites a previous arrangement is admissible in evidence to prove that arrangement."

In the circumstances I have no hesitation in holding that the properties in suit were the separate properties of Ma Daung. That being so, the 1st respondent's case fails. I allow the appeal, set aside the judgments and decrees of the Courts below and dismiss the plaintiffs-respondents' suit with costs.

A. N. A. *Appeal allowed.*

(11) 97 Ind. Cas. 876; 4 R[illegible] 110; A. I. R. 1926 Rang. 172.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1108 OF 1926.

November 1, 1926.

Present:—Mr. Justice Dalip Singh.

RUPA—DEFENDANT—APPELLANT

versus

MAM CHAND AND OTHERS—PLAINTIFFS—RESPONDENTS.

Punjab Tenancy Act (XVI of 1887), ss. 60, 4 (7)—Alienation with consent of landlord—Right of sons to challenge.

Where an alienation of occupancy tenancy has been consented to by one of the landlords, the alienation *qua* his share of the occupancy holding becomes non-voidable and his son and grandson who succeed him are, even apart from Customary Law, bound by his act. [p. 391, col. 2.]

Second appeal from a decree of the District Judge, Hissar, dated the 15th January, 1926, reversing that of the Fourth Class Sub-Judge, Hissar, dated the 2nd February, 1925.

Mr. *Shamair Chand*, for the Appellant.

Mr. *R. C. Soni*, for the Respondents.

JUDGMENT.—The facts of this appeal are as follows:—One Hanwanta was an occupancy tenant of 64 *bighas* 5 *biswas* of land in Sirsa Tahsil. The plaintiffs and the *pro forma* defendants Nos. 2 to 4 are its proprietors. Hanwanta died in 1901 and his widow *Musammat* Rami gave consent to a mutation in favour of Hanwanta's daughter's son Rupa, defendant No. 1. It was alleged in the mutation proceedings that Rupa had been adopted as a son by Hanwanta. In 1912 *Musammat* Rami died and defendants Nos. 2 to 4 brought a suit for possession of the whole of the said land, alleging that Hanwanta had never adopted Rupa as his son. The present plaintiffs were *pro forma* defendants and pleaded that their share of the occupancy tenancy had fallen to the then plaintiffs on account of a private partition. The suit was decreed as to half the property, it being held that there had been no such partition. It seems that the real reason for the pleading in that case was the fact that Kura, the predecessor-in-interest of the present plaintiffs, had acquiesced or agreed to the mutation in favour of Rupa in 1901 or thereabouts. The present plaintiffs who are sons and grandsons of Kura, have now brought a suit for possession of the half share of the land, alleging that Rupa was not the adopted son of Hanwanta. The learned Sub-Judge dismissed the suit on various grounds holding that Kura had given his consent to the mutation, that Rupa was not the adopted son of Hanwanta and that, therefore, the plaintiffs were estopped from bringing the present claim. The learned District Judge held that Rupa was not the adopted son of Hanwanta but held that granting that the plaintiffs' ancestor acquiesced in the mutation, the acquiescence was under some misapprehension of facts and could not bind the plaintiffs because the property in dispute is ancestral *qua* Kura. He, therefore, decreed the suit.

Two points have been argued before me in appeal. Firstly, that the suit is barred by limitation. It seems to me that the case is covered by the Division Bench rul-

ing reported as *Thakur Singh* v. *Bihari Lal* (1) and, therefore, the suit is not barred by limitation.

It has next been argued that the consent of Kura binds Kura and, therefore, binds the present plaintiffs. The point is not free from difficulty. The following rulings have been cited by the learned Counsel for the appellant; *Habib Khan* v. *Muhammad* (2), *Sohaj Ram* v. *Ram Lal*(3), *Chuhar* v. *Jas Kaur* (4) and *Shib Ram* v. *Shib Singh* (5). Counsel for the respondents has cited *Mitra Sen Singh* v. *Janki Kuar* (6) and *Beni Pershad Koeri* v. *Dudhnath Roy* (7) on the question that there was no estoppel even as regards Kura and has also cited *Sohawa Shah* v. *Sher Zaman Shah* (8), *Manohar Lal* v. *Nanak Chand* (9), *Muhammadi* v. *Gokal Chand* (10), *Harvans Singh* v. *Harnam Singh* (11) and *Jaswant Kaur* v. *Wasawa Singh* (12).

Now the question whether in a case of alienation of ancestral land by a proprietor the consent of one of the reversioners would bind his own descendants is not free from difficulty, but it has been held in *Habib Khan* v. *Muhammad* (2) and *Makhan Singh* v. *Kishan Singh* (13) that such an assent if made *bona fide* is binding on the reversioner's son. Be that as it may, it seems to me that the consent of Kura to the mutation in favour of Rupa may be presumed to be the consent of Kura to a fresh occupancy tenancy being created in favour of Rupa. The widow *Musammat* Rami can only be held to have alienated the property in favour of Rupa under s. 60 of the Punjab Tenancy Act. The alienation would be voidable at the instance of the landlord. If the landlord or one of the landlords consented to the alienation, then it would seem to me that *qua* his share of the occupancy tenancy he made the transaction non-voidable. This being so and quite apart from the Customary Law it would follow that his own son and grandson who succeeded to him are bound by his act because they are his representatives within the meaning of s. 4 (7) of the Tenancy Act. I, therefore, consider that the plaintiffs must be considered to be debarred from bringing the present suit and I accept the appeal, reverse the decree of the learned District Judge and restore the decree of the first Court dismissing the suit with costs throughout.

R. L. *Appeal accepted.*

(1) 39 Ind. Cas. 163; 44 P. R. 1917; 1 P. W. R. 1917; 51 P. L. R 1917.
(2) 16 Ind. Cas. 463; 68 P. R. 1912; 194 P. W. R. 1912; 210 P. L. R. 1912.
(3) 22 Ind. Cas. 542; 78 P. L. R. 1914; 69 P. W. R. 1914.
(4) 41 Ind. Cas. 927; 69 P. R. 1917; 103 P. W. R. 1917.
(5) 78 P. R. 1908; 138 P. W. R. 1908.
(6) 82 Ind. Cas. 946; 46 A. 728; A. I. R. 1924 P. C. 213; (1924) M. W. N. 703; 20 L. W. 566; 47 M. L. J. 591; 26 Bom. L. R. 1134; 40 C. L. J. 468; 35 M. L. T. 247; 27 O. C. 208; 51 I. A. 326; L. R. 6 A. (P. C.) 12; 23 A. L. J. 172; 29 C. W. N. 533; 1 O. W. N. 426; 3 Pat. L. R. 169 (P. C.).
(7) 27 C. 156; 26 I. A. 216; 4 C. W. N. 274; 7 Sar. P. C. J. 580; 14 Ind. Dec. (N. S.) 103 (P. C.).
(8) 49 P. R. 1895.
(9) 52 Ind. Cas. 503; 68 P. R. 1919.
(10) 26 P. L. R. 1903.
(11) 84 P. R. 1998.
(12) 76 Ind. Cas. 592; 5 L. 212 at p. 217; A. I. R. 1923 Lah. 353; 5 L. L. J. 347.
(13) 73 Ind. Cas. 273; A. I. R. 1924 Lah. 213.

OUDH CHIEF COURT.

SECOND CIVIL APPEAL No. 457 OF 1924.

April 19, 1926.

Present:—Mr. Justice Misra and Mr. Justice Raza.

B. KAMTA SIROMAN PRASAD SINGH *Taluqdar*—DEFENDANT—APPELLANT

versus

MATA BADAL DICHHIT—PLAINTIFF—RESPONDENT.

Oudh Rent Act (XIX of 1868), s. 125—Oudh Land Revenue Act (XVII of 1876), s. 133—Sale for arrears of rent, effect of—Person who had previously obtained decree against under-proprietor, rights of, whether extinguished.

A sale held under s. 125 of the Oudh Rent Act read with s. 133 of the Oudh Land Revenue Act destroys the rights of the under-proprietors against whom the decree is obtained and of those who hold by virtue of a grant or contract previously made by these under-proprietors, but does not affect the rights of persons not connected with the judgment-debtors. [p. 393, col. 1.]

A person who had previously obtained a decree for the lands in dispute against the superior proprietor and the under-proprietors, is not, consequently, liable to be ejected at the instance of an auction-purchaser at a sale for arrears of rent against the under-proprietors. [p. 393, cols. 1 & 2.]

Second appeal against a decree of the Additional Subordinate Judge, Fyzabad, dated the 6th August, 1924, reversing that of the Munsif, Haveli, Fyzabad, dated the 26th November, 1923.

Mr. *Niamatullah*, for the Appellant.

Mr. *A. P. Sen*, for the Respondent.

JUDGMENT.—This is a defendant's appeal in a suit for possession brought

by the plaintiff-respondent for possession of 9 *bighas* 4 *biswas* 10 *biswansis* land situate in village Koro Raghopur, District Fyzabad. The defendant-appellant is the superior proprietor of the village and the plaintiff-respondent is the representative of one Sheo Sahai, who had obtained a decree for the lands in dispute from the Settlement Court. The decree was obtained against Kulwant Singh and Subdhan Singh, the *pukhtadars* (sub-settlement holders) of the village and against Thakurain Raghunath Kuar, the superior proprietor, the predecessor-in-title of the present appellant. Kulwant Singh and Subdhan Singh made a default in payment of the rent and a decree for arrears of rent was obtained against them and their *pukhtadari* rights were put up for sale and purchased by the superior proprietor in the year 1880. It is alleged that no reservation of any rights whatsoever was made in favour of the predecessor-in-title of the respondent. The lands in dispute, however, continued to remain in possession of the respondent and his predecessors. In 1919 the superior proprietor successfully took proceedings in ejectment in the Rent Court against Ram Dayal, successor of Sheo Sahai, and predecessor-in-title of the respondent. In 1920 the said Ram Dayal brought a suit for recovery of possession in the Rent Court on the ground that he had been illegally ejected but his suit was dismissed. In 1923 the present suit was brought by Ram Dayal in the Civil Court for recovery of possession of the said land on the ground that he was under-proprietor of those lands and had been wrongly ejected by the Rent Court. The suit for possession was brought in the Court of the Munsif Haveli, Fyzabad, who dismissed the plaintiff's suit by decree dated the 26th November, 1923. The learned Munsif held that the effect of the sale in the year 1880 was that all rights in the village, subordinate to the under-proprietors, were wiped off by virtue of s. 125 of the Oudh Rent Act (Act XIX of 1868) and that the plaintiff had, therefore, no right left in the lands in dispute such as would entitle him to recover possession of those lands.

The plaintiff carried the matter further in appeal and the learned Subordinate Judge of Fyzabad by his decree dated the 6th August, 1924, accepted the appeal and decreed the plaintiff's suit. He differed in his conclusion from that arrived at by the learned Munsif and held that the sale held in the year 1880 could not in any way affect the under-proprietary rights of the plaintiff.

The defendant *taluqdar* has now come up to this Court in second appeal and the contention raised before us on his behalf is to the effect that the sale held in the year 1880 not only destroyed the title of the under-proprietors against whom the decree had been passed but also the rights of all persons subordinate thereto, no rights having been specially reserved by the Deputy Commissioner. It was contended that as no rights had been so reserved in favour of the respondent, he was not entitled to any decree. Reliance was placed on s. 125 of the Oudh Rent Act (Act XIX of 1868), ss. 243 and 244 of the C. P. C. (Act VIII of 1859) and ss. 132, 133 and 150 of the Oudh Land Revenue Act (Act XVII of 1876).

There is no doubt that the sale held in the year 1880 was held in execution of a decree for arrears of rent under the provisions of s. 125 of the Oudh Rent Act (Act XIX of 1868). That section provided that if it appeared to the Court that the satisfaction of a decree could be made in the manner provided in ss. 243 and 244 of the C. P. C., it might appoint the Deputy Commissioner as manager of the property in respect of which the arrears were due and the Deputy Commissioner when so appointed might exercise, for the satisfaction of the decree against the judgment-debtor, all the powers which, under any law in force in Oudh, he might have exercised for the recovery of an arrear of revenue due by such judgment-debtor to the Government. Referring to s. 243 of the old C. P. C. (Act VIII of 1859) we find that it authorized a Court to appoint a manager of the property intended to be sold with power to collect rents or other receipts and profits of the land or other immoveable property directed to be sold and apply such rents, profits or receipts towards the payment of the amount of the decree and costs. It appears to us established from the record that the Deputy Commissioner was appointed manager in respect of the under-proprietary tenure held by Kulwant Singh and Subdhan Singh under the provisions mentioned above and that he put up the under-proprietary tenure to sale. The effect of the sale held by the

Deputy Commissioner would, therefore, when read with the provisions contained in s. 133 of the Oudh Land Revenue Act (Act XVII of 1876), be that all grants and contracts previously made would become void against the purchaser at the auction sale. The learned Advocate for the appellant contended that the effect of the sale was to destroy the rights of the respondent as well.

We regret we cannot accept this contention. The decree obtained by Sheo Sahai, the predecessor-in-title of the respondent, was obtained against the superior proprietor of the village and it clearly stated that the decree-holder was to pay a certain sum to the *taluqdar* on account of Government revenue and *taluqdari* dues and a sum of Rs. 5 to the under-proprietors on account of village expenses. The operative portion of the decree clearly stated that sub-proprietary rights had been decreed to Sheo Sahai on payment of a particular sum. It is, therefore, clear that the respondent and his predecessor-in-title were not in any way responsible for the payment of the rent due from Kulwant Singh and Subdhan Singh. Their under-proprietary tenure was quite distinct from the under-proprietary rights for which the predecessor-in-title of the respondent obtained a decree from the Settlement Court against the superior proprietor. The liability for the due rent from Kulwant Singh and Subdhan Singh was not in any way shared by the predecessor-in-title of the respondent. We are unable to accept the large proposition stated by the learned Advocate for the appellant that the effect of a sale held under s. 125 of the Oudh Rent Act (Act XIX of 1868) read with s. 133 of the Oudh Land Revenue Act (Act XVII of 1876) would be not only to destroy the rights of the under-proprietor against whom the decree had been passed and of those who held by virtue of a grant or contract previously made by these under-proprietors, but also the rights of other persons not in any way connected with the judgment-debtors. The intention of the Legislature as contained in s. 133 of the Oudh Land Revenue Act appears to us to be to sell the property free from all incumbrances, grants and contracts made by the judgment-debtors whether prior to the decree or subsequently. It does not appear to us to have been the intention of the Legislature to lay down to the contrary. It would obviously be opposed to all principles of justice and equity to hold that rights of persons not in any way connected with the judgment-debtors would be affected by sale held in execution of a decree against those judgment-debtors. It has not been proved from any evidence on the record that the decree which had been obtained by the superior proprietor against Kulwant Singh and Subdhan Singh was also passed against Sheo Sahai or his successor Ram Dayal. No evidence has been pointed out to us even to show that predecessor-in-title of the respondent was a party either to the suit in which the decree was passed or in the execution proceedings. We are, therefore, of opinion that the sale held in 1880 did not and could not affect the rights of the respondent. He is, therefore, clearly entitled to get a decree for possession of the land in suit on the ground that it is his under-proprietary holding and that the ejectment proceedings held in the Revenue Court are inoperative and cannot affect the said rights.

The appeal, therefore, fails and is dismissed with costs.

A. N. A. *Appeal dismissed.*

MADRAS HIGH COURT.

TESTAMENTARY ORIGINAL SUIT No. 11 OF 1925.

May 4, 1926.

Present:—Justice Sir Kumaraswami Sastri, KT.

GOVINDASAMI NAIDU—PLAINTIFF

versus

KANNAMMAL—DEFENDANT.

Will—Testator in feeble health—Mind poisoned by false allegations—Execution of unnatural Will—Will, validity of—Sound testamentary capacity, what constitutes.

A person who had been enfeebled by a painful illness and had been suffering great pain for some months before the Will was executed was led into the belief that his wife with whom he was very affectionate was neglecting him and that she and her father were only after his property. The testator's father and brother in order to mislead him into the belief that his wife was neglecting him did not write to her about his health or send her any monies to come down to the place where he was an in-patient at a Hospital though he had asked them to do so. The testator conceiving thereby an unreasonable dislike to his wife on account of the machinations of his father and brother executed a Will extremely harsh and cruel in its terms to his wife, depriving her of the custody and guardianship

of all her children and granting her merely a petty maintenance allowance :

Held, that as the testator's mind had been poisoned by false and unfounded allegations, the Will was not valid and a Court would be justified in refusing to grant Probate. [p. 399, col. 1.]

Mr. *K. V. Ramachandra Iyer*, for the Plaintiff.

Mr. *P. G. Krishnier*, for the Defendant.

JUDGMENT.—This suit arises out of an application for Probate of a Will alleged to have been left by one Ramakrishna Naidu who died on the 31st of January 1925. The petitioner is the father of the testator and claims to be executor under the Will. The defendant is the widow of Ramakrishna Naidu and she opposes the grant. She states that she was not aware that her husband left any Will, that her husband was at the time of the alleged execution of the Will an in-patient in the Surgical Ward in the General Hospital, that the Will even if executed is invalid and inoperative, that the petitioner for Probate and his wife were always inimical towards her and her children, that they exercised undue influence over her husband, that she and her husband were living a happy married life and that it is extremely unlikely that her husband would have voluntarily deprived her of the guardianship and custody of her five minor children and cut her off with a maintenance of Rs. 7 a month.

The following issues were settled:—

1. Was the document expounded executed by the deceased and duly attested?
2. Was the deceased in a sound disposing state of mind at the time of the alleged execution of the document?
3. To what relief, if any, is the plaintiff entitled?

I think a further issue arises as to whether the Will was brought about by the exercise of fraud or undue influence.

Ramakrishna Naidu the husband of the defendant was employed in the Government of India as a Stenographer. For some months before his death he was suffering from the distressing complaint of spinal tuberculosis or spinal caires which prevented his getting out of bed. In fact for some months before his death he was unable to sit up and was always lying on his bed. We find from the letters which have been filed as Ex. I series that he was suffering from very great pain and that even as early as the 26th of March, the pain was so great that he swooned and fell down while attempting to go to a shop in Allahabad. In a letter dated the 24th of February, 1924, he writes to his wife about his health as follows: "For the last 3 months I have been feeling great pain in my chest and stomach and I am not able to freely bend or lie down. Medicines have no effect. My right leg is also paining. By the time I finish this letter, the pain on my back has become insufferable and I dare say that you will not be able to recognise me if you see me now. What shall I do? If I think of taking leave I am oppressed with the thought of having to look after five stomachs excluding myself, which is soon going to become six including the one in your womb. Am I at least free after providing for maintenance? I have to equally provide you all with good clothes and ornaments. I am at a loss to know the divine dispensation. Sweet embraces and kisses to my children and the same to you." In the letter of the 6th of March, 1924, he says: "You had enquired what I was ailing from? I have pain all over the body....." In the letter of the 15th of March, he writes: "My pain is still like before. Now my knees also are paining much. I am unable to walk. The back aches, its severity is fully known to me alone who suffers. With all this pain I am attending office work, biting the teeth." On the 26th of March he writes: "Some days back I had gone to the fruit bazar in Allahabad in the accompaniment of two Punjabi friends. All at once I felt weak and unconscious and fell down in the ground feeling only a hard blow on my head. On my re-gaining senses I was told by my friends that I was down for a pretty long time, in spite of their best efforts to help me. If I had died then, or if I was run over by any passing carriage I would have been relieved of these worldly miseries. I have survived this crisis, probably only to be teased by all the people who have made it a point to do so."

The diary kept by the deceased has been filed as Ex. C and we find entries therein which show that he was suffering very much. On the 28th of May, 1924, he writes in his diary "the pain became so acute in the evening that I began to roll in the bed cursing my fate." On the 29th he says that he spent a sleepless night and that the Doctor came and thought that he had an attack of tuberculosis. He says: "Whatever may be the opinion of

Doctor I am having hell of a time." On the 30th he says that the Doctor was not sure as to the exact nature of the disease, and that the pain on the back would not allow him to sit for more than a few minutes. Then he took leave and came to Madras as appears from the entry in his diary on the 12th of May. His suffering increased and he became an in-patient in the Officers' Quarters in the General Hospital. Treatment did him no good and he was taken to a place near Feroke for Ayurvedic treatment and he died on the 31st January, 1925.

So far as the defendant is concerned, the evidence shows that her health was not good. During the nine years she was living with her husband, she had six children, five of whom are now alive. It appears from the letters which I have referred to that in March 1924 she was *en ciente* and the last child was born in May 1924. The confinement was very difficult and she was dangerously ill sometime before her husband came to Madras. A telegram was sent to her husband as to her difficult confinement but his illness prevented him from going to her. There can be little doubt from her evidence that when her husband was ill in the General Hospital her health was bad. She had five young children in her hands and she and her last child was ill. Her husband, when he came on leave and before he went to the General Hospital, went to Coimbatore and saw his wife and children. He was taking some medicine there but finding no relief he left his wife and children at Coimbatore and came down to Madras and went to the General Hospital and was admitted as an in-patient. It is not suggested that her husband had any house in Madras and I see no reason to disbelieve the evidence of the defendant that her husband asked her and the children to remain in *mofussil*, that he came down to Madras stating that he would put himself under treatment and return as soon as possible and that while in Madras he was an in-patient in the Officers' Quarters in the General Hospital, and had no other residence or place where his wife and children could stay if they came to Madras. The petitioner is the father of the testator. The testator had a brother called Narayana and his mother was also alive. The evidence of the defendant and of Kesavalu Naidu, a friend of her husband, who is a retired Supervisor in the Military Accounts Department shows that the feelings between her husband's parents and the defendant were not at all friendly. Her husbaud rose from a small beginning and as is not uncommon in Hindu families the parents resented any great affection which was shown by the husband to the wife. The letters Ex. I series also show that the defendant was not pulling on well with her husband's parents. The defendant states that after her husband came to the Hospital in Madras and she was in *mofussil*, she did not receive any communication from her husband or his parents, that she was ill and also her last child, that she came to Madras about the 11th or 12th November, 1924, accompanied by her father, that when she saw her husband he asked her where the children were, and she said she had left them with her junior paternal uncle, that she asked him about the absence of letters and he said that he had sent letters and money and she did not come to Madras all these days when he was ill and so on, that she said that she had received no letters or money and nobody informed her about his health, that she wrote to Kesavalu and on coming to know of his health she came to Madras, that her husband said that he would make enquiries of his younger brother Narayana and let her know, that he said he asked his brother whether he sent any letters or money to her and the brother gave no reply, that she remained in Madras for five days, and was taking meals in a hotel and going to the Hospital, that her husband's parents never made any enquiries about her or invited her to come and stay with them, but that on the contrary when they saw her they abused her and asked her why she came there, that after she was for five days in Madras her husband said that her health was not good and the child was ill and asked her to go back, that during the time she was in Madras her husband never told her about any Will he had executed or that he had any intention to execute one and that she went back to *mofussil* at her husband's request. Kesavalu Naidu, who is a respectable witness states that he did not know that the defendant's husband was in the General Hospital and that when he went to see a relation of his who was ill there he found that Ramakrishna Naidu was seriously ill. He says that he received a letter from the defendant enquiring about the

welfare of her husband and as to how many months he would have to stay in the Hospital, that he went to the Hospital and showed his wife's letter to the testator, that the testator read it and said that he had made proper arrangements with his brother Narayana to send her money for maintenance and also write to her, that on seeing the letter of his wife the testator thought that his brother might have disappointed them, that the parents of the testator were there at the time and on seeing the testator read the letter they asked him whose letter it was and he said it was a letter from his wife and they said it was a useless letter and asked him not to talk much and said that the Doctor would be annoyed and that he then left. He also says that when defendant's father-in-law brought her from Coimbatore to Delhi and stayed in Calcutta where the witness was then employed he found that the defendant had been starving four or five days and had received no attention whatever.

On the 11th of November, 1924, about a week before the execution of the Will we find the following entry in the diary kept by Ramakrishna "my wife and father-in-law came to see me. From my wife's behaviour it appeared that she came to Madras not so much to see me and attend upon me but to get more money from me. When she came she brought with her only the last born baby, leaving the other children at Sennimalai. When questioned why she did not bring all the children with her, she could not give me a satisfactory reply. When she came to see me in Hospital her father also followed her but instead of coming into my room he used to go to Mr. Doraisami Mudaliar who was undergoing treatment in the next room and speak ill of my parents. *Ex passent.* My father-in-law is said to have declared that so long as he lived he won't allow his daughter to live with me in the midst of my parents, though Mr. Doraisami Mudaliar advised him to the contrary." On the 15th we find the entry—"They left the place abruptly. My father-in-law did not even take leave of me." On the 16th we find the following entry—"Wife and father-in-law left Madras for Sennimalai." There are no entries on the 17th and 18th and on the 19th we have this entry—"the Will was executed to-day."

There can be little doubt that shortly before the execution of the Will the testator thought that his wife did not care for him but rather wanted his money in anticipation of his death and that her father was vilifying his parents and himself and did not attend on him. Now it is clear from the letters written to the defendant and the money order coupons that have been produced that till he came to General Hospital he was on very affectionate terms with his wife. She had borne him six children and the letters which he wrote to her in March before he came to Madras breathe great affection for her and the children. He states that even though he was suffering very much he did not want to take leave because he thought he may not be able to keep his wife and children in comfort. He talks of a present which he was buying for her and which would come to her as a surprise gift. On reading the letters it is impossible to hold that till he came to Madras for treatment he had the slightest cause for being dissatisfied with his wife. Unfortunately when he came to Madras for treatment his wife was also ill. She had a very difficult delivery a short time before and both she and the child were suffering very much and as the husband had no house in Madras and as he was going to the General Hospital for treatment, I see no reason to doubt the statement of the defendant that when he left Coimbatore for Madras for treatment in the General Hospital he asked her and the children to remain in *mofussil* and said that he would get treated and come back. The only relations who were with the testator in Madras were his father, mother and brother. I have little doubt on the evidence in this case that they were not well disposed towards the defendant. It also appears from the evidence that though Narayana was asked by the testator to write to his wife and to send money to her he did nothing, and the testator who had no reason to think that his brother was not complying with his wishes probably thought that his wife was neglecting him and he was encouraged in this belief by his father and brother.

Turning to the terms of the Will I cannot help remarking that it is an extremely harsh and cruel Will. His wife is deprived of the custody and guardianship of all her children. As regards the children under five years of age she is to keep the children until they attain their fifth year and hand them over to his parents or brother.

She is to get a maintenance of Rs. 7 a month should she live separately and she is to receive Rs. 5 if she lived with his parents. It appears from his own letters written to his wife that the feelings between his wife and his parents were not cordial and he must have known what miserable life she would lead after his death if she had to live with his parents. She was left with the choice of either leading a miserable existence in their house or live apart separated from her children. I find it difficult to conceive of a greater refinement of cruelty than is contained in the provisions of this Will. Now, regard being had to the affectionate terms which existed between the wife and the husband before the husband left Coimbatore to come to Madras for treatment, I can only account for the sudden change which came over him when he executed the Will by the unfounded suspicion that had been created in his mind that his wife was not caring for him but that she came to Madras for getting money from him and make sure how long he will last. It should be remembered that at the time of leaving the Will and some months before that he was suffering acutely. For some months before he executed the Will it is admitted that he was not able to get up from bed. Spinal tuberculosis rendered it impossible for him even to sit up. He had to do everything in bed. Even before he took leave he was extremely weak and suffering a great deal and the few months that intervened between his coming to Madras and leaving the Will must have rendered his position extremely miserable. I have little doubt that his position must have been known to be hopeless almost about the time when he left the Will. I see no reason to disbelieve the evidence of the defendant and Kesavalu Naidu and I think it is clear that the father and the brother of the testator influenced him against his wife by suggesting that she did not care for him and that in order to estrange them the father and brother did not write to her about the testator's health or send her any money although the brother was asked to do so by the testator. They have not ventured to go into the box and contradict the evidence given against them and on this part of the case I think the evidence and probabilities show that for their own ulterior purpose they prejudiced the testator against his wife.

As regards the terms of the Will although the plaintiff derives no direct benefit under the Will, they have the control over the property left by the deceased amounting to Rs. 10,570, and the custody and bringing up of the children so that it is obvious that they would maintain themselves and the children with the income. There is also a legacy of Rs. 500 to the testator's sister and Rs. 500 to Narayana his brother.

It is significant that in his diary the testator states that his father-in-law had declared that so long as he lived he would not allow his daughter to live with the testator in the midst of his parents and that he was also vilifying him. This was not said in his presence and somebody must have invented this story to prejudice him against his wife, and her father. He says that his father-in-law was speaking ill of his parents. Here again somebody must have told him this story, and as only his parents and brother were with him it is extremely probable that they must have prejudiced him by trying to make out that both his wife and her father were after his property and did not care for him. It is easy to see what the effect of all this would be on a chronic invalid like the testator who had to spend almost all his time in bed and in constant severe pain. It may be that his intellect was not clouded but he must have been weak and amenable to suggestions of the kind made to him that his wife was not going to see him was due to her indifference and the aversion he suddenly took was due to the machinations of the parents and brother of the deceased. There is no reason why the defendant who was in affectionate terms with her husband would not have come to see him if she was kept informed of his health. On the evidence and probabilities I have no hesitation in coming to the conclusion that the testator and his wife were on very affectionate terms till the testator came to Madras for treatment, that he was suffering very much for some months before he executed the Will, that he was extremely feeble in body and that taking advantage of these facts his parents and brother who were not well disposed towards the defendant prejudiced him very much against her and suggested the idea that he was being neglected by those who ought to be near him.

As regards the exact state of his health in the Hospital at the time the Will was executed the plaintiff has adduced no

medical evidence. The only evidence adduced by the plaintiff is that of Viswanatha Sastry, a Vakil of this Court and Kalyana Chetty, who is an attesting witness to the Will. Viswanatha Sastri says that Kalayan Chetty plaintiff's second witness, told him that the deceased was in the General Hospital in Officers' Quarters and wanted to leave a Will and wanted legal advice, that he went to the Hospital and had two interviews with the testator and that the Will was written and executed. He says that at the first interview the testator gave him instructions which he took down and he proves that the Will Ex. A was executed and attested. He states that at the time the testator seemed to understand everything rationally. He states that the words in the Will "for reasons best known to myself and in the best interests of the minor children, etc.," were the testator's own words and that the witness did not want to know what the reasons were. He states that the testator's father and mother were present and that the particulars for the preparation of the Will were given by all of them. Plaintiff's second witness Kalyana Chetty says that he was present at the time of the execution of the Will and attested the Will and saw the other witnesses also attest the Will and that he identified Ramakarishna Naidu before the Sub-Registrar. He says that the testator was in sound state of mind when he dictated the terms of the Will. He says that the testator told him that he was not happy with his wife because she did not attend on him during his illness. He admits that the deceased was unable to sit up and that he was able to write only lying on his back. On this evidence there can be no doubt that the Will was executed by the deceased. But the question is whether where a person who had been enfeebled by a painful illness and had been suffering great pain for some months before the Will was executed is led into the belief that his wife was neglecting him and that she and her father are only after his property and where the testator's father and brother in order to mislead the testator into the belief that his wife is neglecting him did not write to her about his health or send her any monies to come down to Madras though the testator asked them to do so, a Will by the testator who conceives an unreasonable dislike to his wife brought about by the machinations of those who were near him can be valid. I am unable to bring myself to hold that such a Will is valid. I find it difficult to resist the conclusion that the parents and the brother of the deceased who were not on good terms with the wife of the deceased purposely refrained from writing to her about his health and sending any monies to her though the testator wanted his brother to do so and that they prejudiced the testator against his wife by telling him that his wife was neglecting him and that even after she and her father came to Madras the testator's mind as appears from the diary was poisoned against her by telling him that his father in-law was speaking ill of his father and was stating that he would not allow his daughter to live with the testator's parents. The entries in his diary on the 11th and 15th of November show that he must have been prejudiced against her by statements said to have been made by others. The petitioner who is the father of the testator and the testator's brother did not venture to give evidence and I have little doubt that they did their best to poison the mind of the testator against his wife and that through no fault of hers. She was the victim of an unreasonable dislike created by the plaintiff. Under these circumstances I cannot bring myself to uphold this Will.

Various authorities were referred to by both sides. For the plaintiff it is argued that there should be coercion in the strict sense in order to invalidate the Will and that mere influence gained by one over the other and the execution of the Will under such influence could not invalidate the Will. Reference has been made to *Wingrove* v. *Wingrove* (1), where it was held by Sir James Hannen that in order to constitute undue influence in the eye of law there must be coercion; to *Baudains* v. *Richardson* (2), where it was held that though influence may be degrading and pernicious yet it would not be undue influence in the eye of the law and to *Pilkington* v. *Gray* (3), where it was held that testamentary capacity is not disproved by evidence of the testator's merely eccentric acts and conduct.

For the defendant it is argued that in order to constitute sound testamentary capa-

(1) (1886) 11 P. D. 81; 55 L. J. P. 7; 34 W. R. 260; 50 J. P. 56.
(2) (1906) A. C. 169; 75 L. J. P. C. 57; 94 L. T. 290; 22 T. L. R. 333.
(3) (1899) A. C. 401; 68 L. J. P. C. 63.

city the testator must be in a position to realise the claims which his wife and children have on him and that where his mind has been poisoned by unfounded allegations of misconduct and he disposes of property in a manner which he would not have done but for the false statements made to him by those near him regarding his wife with whom he was previously on good terms, the Will cannot be said to have been executed by him while of sound disposing mind. Reference has been made to s. 61 of the Indian Succession Act of 1925 which states that a Will or any part of a Will, the making of which has been caused by fraud or coercion, or by such importunity as takes away the free agency of the testator, is void, and it is argued that in the present case the conduct of the plaintiff and the testator's brother would bring the case within that section. Reference has also been made to *Dew* v. *Clark* (4) and *In re Charles William Peek* (5). I can see nothing in the authorities cited by the plaintiff's Vakil which on the facts I have found proved constrains me to grant Probate. I am of opinion that the Will is not valid and dismiss the application for Probate with costs.

V. N. V. *Application dismissed.*

(4) (1826) 162 E. R. 410; 3 Add. 79.

(5) (1860) 164 E. R. 1093; 2 Sw. & Tr. 506; 29 L. J. P. 95.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 333 OF 1925.

November 8, 1926.

Present:—Mr. Hallifax, A. J. C.

BAHORAN AND OTHERS—DEFENDANTS—APPELLANTS

versus

CHANDANDHAR AND OTHERS—PLAINTIFFS—RESPONDENTS.

Tort—Conspiracy—Liability of each conspirator for act done by the others—Legal representative of tort-feasor, liability of.

In a conspiracy to commit a tort each of the conspirators will be liable for the entire damages jointly and severally with the others irrespective of the question whether the tort was actually committed by himself or by the other conspirators.

The legal representatives of a tort-feasor are not liable for damages for the tort unless it is shown that they benefited by it.

Appeal against a decree of the Additional District Judge, Bilaspur, dated the 14th April, 1925, in Civil Appeal No. 140 1924.

Messrs. *G. R. Deo*, *A. Bhagwant* and *S. A. Ghadge*, for the Appellants.

Mr. *Yadaorao Bhagdikar*, for the Respondents.

JUDGMENT.—The only contentions in the petition of appeal to this Court are that the finding as to the number of trees cut and their value is wrong, making the number too great and the value too high, and that there could not be "a joint decree against all the appellants." The first contention was expressly withdrawn, and the second was not argued. In its place was substituted an argument to the effect that the decree should be passed against only those of the defendants who were proved to have taken an actual part in the cutting of the trees. They all conspired to cut the trees, and if some of them got the cutting done by the others they would surely be just as liable as if each of them had sent out a servant to do his part for him. It may be mentioned also that the plea is hardly a wise one to take on behalf of all the defendants, when it is admitted that some of them are liable; each of those who are liable is altruistically asking for an increase of his own burden.

The plea taken on behalf of two of the twenty-three appellants is sound, as far as it goes, but its success has no appreciable result. It is probably for that reason that the respondents admitted its validity, though it is raised for the first time in this Court. Ujiyar one of the original defendants died during the trial of the suit, and his two sons Manyar and Mandal were made defendants in his stead. They are not liable in damages for their father's tort, unless it is shown that they benefited by it. The decree of the lower Appellate Court will accordingly be modified by the removal of the names of Manyar and Mandal from the list of persons responsible for the amount of the damages, leaving the other twenty-one appellants jointly and severally responsible. These twenty-one appellants will also pay all the costs of the respondents in this appeal.

A. N. A. *Appeal dismissed.*

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 530 OF 1925.

June 2, 1926.

Present:—Mr. Justice Fawcett and Mr. Justice Madgavkar.

RAMCHANDRA BAJAJI BHANDGIRE AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Shripati SUBHAJI BHANDGIRE —DEFENDANT—RESPONDENT.

Transfer of Property Act (IV of 1882), ss. 63, 76 (c), 108 (h)—Mortgage—Mortgagee in possession—Right to cut down trees—Waste.

A mortgagee in possession of land does not commit waste by cutting down trees planted by him on the mortgaged land unless his act is destructive or injurious to the property.

Second appeal from a decision of the Assistant Judge at Satara, in Appeal No. 313 of 1924, reversing the decree of the Subordinate Judge at Wai, in Suit No. 306 of 1923.

Mr. *P. B. Shingne*, for the Appellants.

Mr. *B. G. Rao*, for the Respondent.

JUDGMENT.

Fawcett, J.—In this case the plaintiffs appellants sued to recover possession of the plaint plot, which is an open site, and also to recover Rs. 50 by way of damages for trees cut down and removed by the defendant, the allegation being that the plaint property was of the plaintiffs' exclusive ownership and enjoyment and that the defendant had not the least right over the trees that he had cut.

The trial Court found in favour of the plaintiffs' claim for ownership and granted them the decree as sought.

On appeal, the Assistant Judge held that the plaintiffs had not satisfied certain mortgage-deeds executed in favour of the grandfather of the defendant about the plaint property, and that, therefore, the plaintiffs were not entitled to the site as owners. He also held that these particular trees had been planted by the defendant as mortgagee, and that he had a right to plant and remove the trees. Accordingly, he reversed the lower Court's decree and dismissed the plaintiffs' suit with costs.

This appeal has been admitted only on the question whether the mortgagee-defendant can cut down trees which he has planted after entering into possession. This question resolves itself into whether the appellants are entitled to damages for the act of the defendant in cutting down trees, and the appellants can only be so entitled if the mortgagee has committed a tort by his act. The plaint, as already mentioned, is on the basis of the plaintiffs being owners of the land and the defendant having no right over it whatever. In such a case, of course, the defendant's cutting the trees, even if he had planted them, would be a tort. But, it has been held that the defendant was in lawful occupation of the ground as mortgagee when he planted and when he cut the trees, and the point is whether he can be said to have committed a tort in cutting them. The mortgagee in possession can, no doubt, commit waste, which is a species of tort, by cutting down trees on mortgaged property, *cf.* s. 76 (*c*) of the Transfer of Property Act, and *Raghu Nath Das* v. *Ashraf Hussain Khan* (1). But this would ordinarily be in respect of trees already on the property when it was mortgaged, and I know of no authority for extending it to the case of trees planted by the mortgagee unless, in the words of s. 76 (*c*) of the Transfer of Property Act, the act is "destructive or permanently injurious to the property." This, however, has not been made out in the present case. No evidence was adduced to that effect; and, as I have already mentioned, the claim for damages is put on an entirely different basis. Also, the analogous law in the case of a tenant planting and cutting down trees is against the view put forward for the appellants, *cf.* *Sitabai* v. *Sambhu Sonu* (2) and s. 108 (*h*) of the Transfer of Property Act. The land is not agricultural, so no question of its utility being injured by tree-roots or stumps arises.

In my opinion, it is unnecessary to decide whether, if the trees were still on the land and the mortgagors' representatives were suing for redemption, they could claim to take possession of the trees without compensation under s. 63 of the Transfer of Property Act. Even assuming they could do this, this does not involve the consequence that, in the eye of the law, the cutting down of the trees is a tort. I would, therefore, dismiss the appeal with costs.

Madgavkar, J.—I agree.

A. N. A. *Appeal dismissed.*

(1) 2 A. 252; 4 Ind. Jur. 249; 1 Ind. Dec. (N. S.) 715.

(2) 28 Ind. Cas. 140; 38 B. 716; 16 Bom. L. R. 595.

RANGOON HIGH COURT.

CRIMINAL REFERENCE No. 109 OF 1926.

August 16, 1926.

Present:—Justice Sir Benjamin Herbert Heald, KT., and Mr. Justice Chari.

NGA PAN GAING AND OTHERS—ACCUSED—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Registration Act (XVI of 1908), ss. 82, 83—Offences under the Act—Prosecution by private person, legality of—Permission of Registration Officer, whether necessary—'May,' meaning of.

A prosecution for an offence under the Registration Act coming to the knowledge of a Registering Officer in his official capacity cannot be commenced by a private person without the permission mentioned in s. 83 of the Act. [p. 403, col. 2: p. 407, cols. 1 & 2.]

'May' in s. 83 of the Registration Act must be read as equivalent to 'must be'. [p. 407, col. 1.]

Per *Chari, J.*—The use of the word 'may,' by itself, gives no indication of the intention of the Legislature. Where there are a number of persons by any one of whom an act can be performed the Legislature uses the word 'may' simply to show that it is open to any one of such persons to perform that act. Whether the performance of the act is obligatory or optional and whether such performance is confined to the persons specified in the Statute are matters in respect of which the intention of the Legislature will have to be gathered from the other provisions and the general scheme of the enactment. [p. 405, col. 2; p. 406, col. 1.]

Hussain Khan v. *Emperor* (5) and *Emperor* v. *Jiwan* (6), followed.

Gopinath v. *Kuldip Singh* (2), *In re Piramu Nadathi* (3), *In re Palani Goundan* (7), *Gobindia* v. *Emperor* (8) and *Indrani Bahu* v. *Rani Badi Dulaiya* (9), not followed.

ORDER OF REFERENCE.

Heald, J.—(*July 5, 1926*). "On the 13th of March, 1924, Paw U and his wife, Ma Hnin Me, mortgaged a holding of paddy land measuring 11·20 acres together with two smaller holdings to one Po Hmat for Rs. 700 with interest thereon at 3 per cent. per mensem. The wording of the document shows that although the land was described as paddy land some of it had not yet been brought under paddy cultivation.

"On some date after the 5th of May, 1924 probably very soon after that date, Paw U and Ma Hnin Me entered into a written agreement with one Maung Gale about the same eleven-acre holding and four adjoining pieces of land which were described as *dani* plantations. For the purposes of this case it does not matter whether or not the lands described as *dani* plantations represent the uncultivated parts of the land which had been mortgaged. The eleven-acre holding to which this agreement refers was certainly the eleven-acre holding which had been mortgaged. That agreement referred to an earlier agreement dated the 22nd of April, 1924, whereby Paw U and Ma Hnin Me agreed to sell the eleven acre holding and four adjoining *dani* plantations to Maung Gale for Rs. 830, of which Rs. 530 was to be paid at once and was to be regarded as earnest-money, and the balance of Rs. 300 was to bear interest at 3 per cent. per mensem and was to be paid by the 8th of March, 1925, and whereby Paw U and Ma Hnin Me agreed to transfer the land to Maung Gale's name on the price being so paid in full, and it stated that that agreement was to remain in force, and that Maung Gale was to work the land for the season 1924-25 and that if he failed to pay the balance of the price of the land as agreed he should pay a rent of 130 baskets of paddy which Paw U and Ma Hnin Me should be entitled to take out of the actual crops for that season.

It is admitted that Maung Gale paid the Rs. 530 at that time.

On the 5th of March, 1925, Paw U and Ma Hnin Me signed a document in which they acknowledged receipt of the balance of the price and declared that Maung Gale was beneficial owner of the land and that they undertook to give him a registered conveyance as soon as they had redeemed the mortgage.

On the 8th of June, 1925, one Pan Gaing, who held a power-of-attorney from Maung Gale, presented for registration a conveyance which purported to have been executed by Paw U and Ma Hnin Me. In his application to the Registering Officer he said that Maung Gale had bought the land for Rs. 830, that Paw U and Ma Hnin Me had signed a document, that Maung Gale had paid the Rs. 830 in full and that Paw U and Ma Hnin Me refused to have a conveyance registered. He asked that they should be summoned and that the conveyance which he presented should be registered. The Registering Officer summoned Paw U and Ma Hnin Me, who admitted that they had agreed to sell the land and had received the price, but denied that they had signed the conveyance. Registration was, therefore, refused.

On the 18th of July Paw U filed a complaint against Maung Gale's agent, Pan Gaing, and against the three witnesses who attested the document, charging them with an offence under s. 465 of the Indian Penal

Code and with abetment of that offence, and also with an offence under s. 82 of the Registration Act.

The Magistrate charged Pan Gaing under s. 82 (*a*) of the Registration Act with making a false statement to the Registering Officer by stating that the conveyance was signed by Paw U and Ma Hnin Me, and he charged two of the attesting witnesses, Tun Yin and Maung Sin, with abetment of that offence. He found them all guilty and sentenced them to a fine of Rs. 200 each with six months' rigorous imprisonment in default. Apparently the fines have not been paid, but it does not appear that the accused have yet been sent to Jail.

They appealed, and the learned Additional Sessions Judge upheld the convictions and sentences.

They now come to this Court in revision.

It seems to me that this prosecution raises an important point of law, namely, whether in view of the terms of s. 83 of the Registration Act a prosecution under s. 82 of that Act can be instituted by a private person without the permission of the Registering Officer.

The Registering Officer under ss. 3 and 6 of the Act are the Inspector-General of Registration, the Registrars and the Sub-Registrars. If there is more than one Sub-Registrar in a sub-district the Registering Officers for that sub-district are known as Joint Sub-Registrars, but they are presumably still Sub-Registrars for the purposes of s. 83.

That section says that a prosecution for any offence under the Registration Act coming to the knowledge of a Registering Officer in his official capacity may be commenced by, or with the permission of the Inspector-General, the Registrar or the Sub-Registrar in whose territories, district, or sub district, as the case may be, the offence has been committed. The section does not say that prosecutions may not be otherwise commenced, but *expressio unius est exclusio alterius.*

There are, however, conflicting decisions of the High Courts in India on this point.

In the case of *Maung Saing* v. *Emperor* (1) a Single Judge of this Court said: "In view of the Full Bench ruling of the Calcutta High Court in *Gopinath* v. *Kuldip Singh* (2) it must be taken as settled law that no sanction is necessary for a prosecution under s. 82 of the Registration Act."

All that the learned Judges say on the subject in the case cited is "we are of opinion that no sanction is required. It has been contended that, under s. 83 of the Registration Act, it is necessary that some one of the officers who are mentioned in that section must have given previous permission to institute proceedings; but we think that it is not so. The provisions of s. 83 are not obligatory. They rather seem to be intended for the purpose of enabling the officers of the Registration Department, when they should see fit, to institute any prosecution under the Act upon their own responsibility." With all respect for the opinion of the learned Judges who were parties to that decision I am of opinion that their statement of the purpose of the section is inadequate. It certainly provides for the institution of prosecutions by Registration Officers, but it also added a new provision for prosecution by private persons with the permission of Registration Officers, and the question is whether the latter provision excludes prosecution by private persons without such permission.

That question was considered in 1917 by a Bench of the Madras High Court in *In re Piramu Nadathi* (3) and Ayling, J., said "I am inclined to hold that permission of the Registration Officers is not a preliminary requisite for the institution of proceedings by a private person for offences under the Registration Act." Napier, J., said that he agreed with his learned brother but that the question was one on which it was possible to arrive at a different conclusion as could be seen from the decisions of the Calcutta High Court. He referred to the cases of *Queen-Empress* v. *Batesar Mandol* (4), *Hussain Khan* v. *Emperor* (5) and *Emperor* v. *Jiwan* (6) in which a contrary view had been taken, and he admitted that he had had great difficulty in arriving at a conclusion.

In *In re Palani Goundan* (7) in the same

(1) 76 Ind. Cas. 431; 1 R. 299; 25 Cr. L. J. 191; A. L. R. 1924 Rang. 213.

(2) 11 C. 566; 5 Ind. Dec. (N. S.) 1136 (F. B.).

(3) 38 Ind. Cas. 976; 40 M. 880; 21 M. L. T. 118; 5 L. W. 414; 18 Cr. L. J. 416.

(4) 10 C. 604; 5 Ind. Dec. (N. S.) 405.

(5) 36 Ind. Cas. 145; 14 A. L. J. 412; 38 A. 354; 17 Cr. L. J. 465.

(6) 27 Ind. Cas. 208; 37 A. 107; 13 A. L. J. 4; 16 Cr. L. J. 144.

(7) 62 Ind. Cas. 582; 40 M. L. J. 211; 13 L. W. 195; (1921) M. W. N. 144; 29 M. L. T. 141; 22 Cr. L. J. 566.

Court Ayling, J., followed the decision in *In re Piramu Nadathi* (3) but in that case although Spencer, J., said that he was not prepared to differ from that decision, he went on to say "Although I recognise the fact that a different view has twice been taken by the learned Judges of the Allahabad High Court sitting singly, I am inclined to prefer the opinion of a Bench of this Court supported as it is by a Full Bench of the Calcutta High Court in *Gopinath* v. *Kuldip Singh* (2) and by the language of s. 83, which is not prohibitory like that of s. 195 of the Cr. P. C., but permissive."

It is clear from the wording of these decisions that none of these learned Judges was satisfied that the matter was free from doubt.

In *Hussein Khan* v. *Emperor* (5) a learned Judge of the Allahabad High Court said. "Section 83 seems neither very clear nor grammatical. Bearing in mind, however, that the offence is the creation of the Registration Act and finds no place in the Penal Code, I think the accused is entitled to the benefit of any ambiguity in the provisions of the Act. It is certainly not an unreasonable contention to be urged on his behalf that a prosecution for an offence under s. 82 should not be commenced without the permission referred to in the section. It is said that the permission only refers to permission (? prosecution) by a registering authority. This seems hardly correct because the different registering authorities are the very persons who are named by the section as the persons who should grant the permission. The applicant cites the case of *Emperor* v. *Jiwan* (6). It seems quite clear that Tudball, J., was of opinion that permission was necessary before a prosecution for an offence under s. 82 could be commenced. I allow the application."

It is probable that this decision was considered and not followed by the Madras High Court in *In re Palani Goundan* (7) and doubts were certainly cast on its correctness in the case of *Gobindia* v. *Emperor* (8), but I am not satisfied that it was mistaken. The principle which was embodied in s. 195 of the Cr. P. C. is that prosecutions for offences which are regarded as contempts of the lawful authority of public servants, of which, it is to be noted, furnishing false information to a public servant is one, are not to be instituted without the sanction of the public servant concerned or of some public servant to whom he is subordinate. The application of that principle has recently been made more stringent by the amendment of the Code which provides that an actual complaint of a public servant is now necessary.

"The provisions of s. 83 of the Registration Act as to the necessity for the permission of the Registering Officer concerned or of some Registering Officer to whom he is subordinate are so similar to those of s. 195 of the Code that I think that it is a fair presumption that the Legislature intended to apply a similar principle. The Registration Act of 1866 clearly contemplated and provided for the institution of prosecutions for offences under the Act only by Registering Officers, and if that Act had not been amended, as it has been in the two succeeding Registration Acts, I see no reason to doubt that the Courts would have held on the principle of *expressio unius* that none but a Registering Officer could institute a prosecution for an offence under the Act. In the amendment of the Act provision was made for the institution of prosecutions by private persons with the permission of the Registration Officer concerned or of some Registration Officer to whom he was subordinate, as well as by Registration Officers themselves, but I see no reason why the principle should not still apply so as to prevent the institution of prosecutions by private persons without such permission.

"As, however, the matter is admittedly open to question and there is a decision of a Judge of this Court in the contrary sense I refer the following question for the decision of a Bench or a Full Bench according as the learned Chief Justice may direct:—

Can a prosecution for an offence under the Registration Act coming to the knowledge of a Registering Officer in his official capacity be commenced by a private person without the permission mentioned in s. 83 of the Act?

Mr *Robertson*, for the Petitioner.

Mr. *Eggar*, Government Advocate, for the Crown.

The matter coming on for hearing before Heald and Chari, JJ., their Lordships delivered the following

OPINION.

Chari, J.—The question referred for

(3) 81 Ind. Cas. 124; 5 P. L. T. 372; (1924) Pat. 199; 2 Pat. L. R. 162 Cr.; 25 Cr L. J. 636; A. I. R. 1924 Pat. 754.

decision is "Can a prosecution for an offence under the Registration Act coming to the knowledge of a Registering Officer in his official capacity be commenced by a private person without the permission mentioned in s. 83 of the Act ?"

The facts which led up to the reference are that one Pan Gaing, the agent of Maung Galay, the vendee and three persons who are supposed to have attested a sale-deed were charged with an offence under s. 465 of the Indian Penal Code, with abetment of that offence and also with an offence under s. 82 of the Registration Act. So far as the offence under s. 465 of the Indian Penal Code is concerned no sanction or permission is necessary, and the reference is only in respect of the offence under s. 82 of the Registration Act.

The relevant sections of the Registration Act are ss. 81, 82 and 83. Section 81 makes the endorsing, copying, translating or registering of a document by a Registering Officer charged with those duties in a manner which he knows or believes to be incorrect, intending thereby to cause injury as defined in the Indian Penal Code to any person, an offence punishable with imprisonment which may extend to seven years or with fine or with both. Section 82 deals with three classes of offences classified under (*a*), (*b*), (*c*) and (*d*) of the section. The offences are made punishable in the same manner as under the previous section. Clause (*a*) deals with intentionally making false statements before officers acting under the Act, (*b*) with intentionally delivering to a Registering Officer a false copy or translation of a document or a false copy of a map or plan and (*c*) with false personation and presentation of a document or the making of an admission or a statement in an assumed character in any proceeding or enquiry under the Registration Act. Clause (*d*) deals with the abetment of the above offences. Section 83 runs as follows: "A prosecution for any offence under this Act coming to the knowledge of a Registering Officer in his official capacity may be commenced by or with the permission of the Inspector-General, the Branch Inspector-General of Sindh, the Registrar or the Sub-Registrar, in whose territories, district or sub-district, as the case may be, the offence has been committed." The point for consideration is whether a prosecution under the Act can be commenced by a private person, that is, whether the wording of s. 83 which enacts that a prosecution may be commenced by certain officers or with their permission, is mandatory or permissive. Before dealing with the authorities on the point which are conflicting, I shall refer to the wording in the old Registration Act of 1866, the corresponding section of which was the same as the section in the later Acts with two differences. The wording in the Registration Act of 1877 is the same as the wording in the present Act. The Act of 1866 after the words 'in his official capacity' contained the words 'may be instituted by' instead of the words in the present Act 'may be commenced by or with the permission of.' The old Act, also, before the words 'Sub-Registrar' contained the words 'with the sanction of the Registrar to whom he is subordinate.' These words have been omitted in the present Act so that the Sub-Registrar's discretion to commence proceedings is not fettered by any limitation. It will thus be noticed that the word 'may' is used in both the Acts and the words 'with the permission of' did not appear in the old Act. If the word 'may' in the old Act can be read as being permissive and if the old Act did not bar private prosecutions then it follows that the later Acts could not have been intended to bar private prosecutions either, and that the words 'with the permission of' were inserted merely to enable the Registering Officer to depute some one else to file the complaint instead of going himself to the Magistrate's Court. It is unfortunate that there are no decisions under the old Act. The rulings on this question are not uniform. In the case of *Queen-Empress* v. *Batesar Mandal* (4) a Bench of the Calcutta High Court was of opinion that a prosecution for the offence of giving false evidence before a Sub-Registrar can only be commenced either by him or by any of the officers mentioned in s. 83 or with the sanction of one of them. No reasons are given in support of this opinion. In *Gopinath* v. *Kuldip Singh* (2) a Full Bench of the same High Court took a different view. In this case the reasons given by the learned Judges are that the provisions of s. 83 are not obligatory and that these provisions appear to have been intended to enable the officers of the Registration Department to institute any prosecution under the Act on their own responsibility if they should think fit. I shall consider later whether the section is obligatory or not, but the statement of the

object of that section, as my learned colleague points out, is unsatisfactory. If the intention of the Legislature was not to put any limitation or bar on prosecutions, there was no need for a special provision that an officer of the Registration Department may institute proceedings since it is always open to him to do so. In the Madras High Court there are two cases: the case of *In re Piramu Nadathi* (3) and a later case *In re Palani Goundan* (7). In the former Mr. Justice Ayling and Mr. Justice Napier took the view that no permission was necessary for the institution by a private person of proceedings for an offence under s. 82 of the Registration Act. Mr. Justice Ayling was of opinion that the intention of s. 83 was merely to prevent official prosecution for offences under the Act being instituted by an officer below a certain grade. This statement of the intention of that section does not strike me as being any more satisfactory than the one given in the Calcutta Full Bench case and I fail to see what distinction there can be between an official and a non-official prosecution which necessitates a special provision in respect of the former. Mr. Justice Napier distinguished the offences created by the Registration Act from the offences created by other special Acts and from a consideration of the offences created by the Registration Act drew the inference that enquiries into false statements made before a Registering Officer are for the benefit of a particular person who may be injured or otherwise affected by the registration of a document and that, therefore, they were in a different class from such offences as contempt of the authority of public servants or offences against the Government. He admitted that there were decisions to a contrary effect and expressed his regret that the judgments in these decisions did not give a reasoning of the learned Judges, a regret in which I share. The case of *In re Palani Goundan* (7) gives no additional reasons. Mr. Justice Ayling was a member of the Bench in this case also. Mr. Justice Spencer was not prepared to differ from the opinion expressed in the earlier case. In the opening portion of his judgment he refers to the fact that an offence under s. 82 may also be an offence under the Indian Penal Code, and under s. 195 of the Cr. P. C. before its recent amendment, sanction would have been necessary. A consideration of this circumstance leads me to a conclusion different from the one arrived at by the learned Judges of the Madras High Court. Before referring to the cases of the Allahabad High Court, which has taken a different view, I shall refer to the case of *Gobindia* v. *Emperor* (8), referred to by my learned colleague. This case was a decision of a Single Judge of the Patna High Court who had held that truth or falsity of recital in a deed was not one of the matters into which a Registering Officer was entitled to enquire and that, therefore, the offence did not come under s. 82 of the Registration Act. Having so held, the learned Judge proceeded to dispose of another argument raised before him that the prosecution was bad in the absence of the permission of the Registering Officer. He cited the Allahabad and the Calcutta Full Bench cases and the Madras case of *In re Piramu Nadathi* (3) and expressed his agreement with the Madras and Calcutta decisions, though it was not necessary for him to decide that point. I may also refer to the case of *Indrani Bahu* v. *Rani Badi Dulaiya* (9). in which the learned Additional Judicial Commissioner of Nagpur followed the Calcutta and Madras rulings. He draws attention to the fact that the word used in s. 83 of the Registration Act is 'may' and not 'must be.'

As against these authorities we have the decision of the Allahabad High Court which had taken a different view. In the case of *Emperor* v. *Jiwan* (6) and the later case of *Hussain Khan* v. *Emperor* (5), two Judges of the Allahabad High Court sitting as Single Judges took the view that it was not competent for a private person to institute a prosecution for an offence under the Registration Act without the previous permission of a Registering Officer. The ground on which the Chief Justice decided the later case seems to have been that as there is ambiguity in s. 83 of the Registration Act the accused is entitled to the benefit of that ambiguity.

These are the only authorities on the point. Considering the matter on principle without reference to authority I have come to a conclusion in agreement with that of the learned Judges of the Allahabad High Court. My reasons are the following: The use of the word 'may,' by itself, gives no indication of the intention of the Legislature. Where there are a number of persons by any one of whom an act can be

(9) 87 Ind. Cas. 913; 26 Cr. L. J. 1025; A. I. R. 1925 Nag. 344; 21 N. L. R. 167.

performed the Legislature uses the word 'may' simply to show that it is open to any one of such persons to perform that act. Whether the performance of the act is obligatory or optional and whether such performance is confined to the persons specified in the Statute are matters in respect of which the intention of the Legislature will have to be gathered from the other provisions and the general scheme of the enactment. A consideration of the provisions which create the offence and the purpose for which s. 83 was enacted leads me to the conclusion that the word 'may' is used here in the sense of 'must be' and that that word is used merely because more than one person is authorised to institute proceedings. Section 81 of the Registration Act enacts that every Registering Officer or any person employed under him who being charged with the duty of endorsing, copying, translating or registering documents does any of these things incorrectly with intent to cause injury to any person, is liable to punishment. This section is intended to punish the Registering Officers or their clerks for intentional dereliction of duty. Section 83 is general in its terms and applies to the offences under both the sections, *viz.*, 81 and 82 of the Act. If the intention was not to bar private prosecutions in respect of offences under the Registration Act, it is open to any person to drag a Registering Officer or his clerk into a Criminal Court for an incorrect registration, and he can do so in spite of the fact that the superior of the registering official has made enquiries and has satisfied himself that the incorrect registration was due to accident without any intention to cause injury. I hardly think that such a result was contemplated. Turning now to the succeeding section which creates three classes of offences the first one is intentional making of a false statement before an officer acting in execution of the Registration Act in any proceeding or inquiry under that Act and it is immaterial whether this statement was made on oath or whether it has been recorded or not. As s 84 of the Registration Act makes all Registering Officers 'public servants' within the meaning of the Indian Penal Code such a statement may fall under s. 181 or under s. 182 of the Indian Penal Code according to circumstances. Section 181 of the Code is narrower in scope than s. 82 (*a*) of the Registration Act because it applies only to cases where the person making the statement is bound by an oath or affirmation to state the truth, and the maximum punishment prescribed is three years' imprisonment instead of the seven years of the Registration Act. If in such a case a private prosecutor wants to proceed not under the Registration Act but under the Penal Code for an offence which falls under s. 181 of the Code, the provisions of s. 195, cl. 1 (*a*) of the Cr. P. C. will bar such a prosecution. Under the Cr. P. C. as now amended a Court can take cognizance of such an offence only on a written complaint by the public servant concerned. As a Registering Officer is a 'public servant' though not a 'Court' for the purpose of the succeeding sub-cls. (*b*) and (*c*) the complaint must be made by him and cannot be instituted by a private person but when the same act is also an offence under s. 82 of the Registration Act which is a Special Act and provides a much heavier penalty it is suggested that it is open to a private prosecutor to institute proceedings on his own initiative. This is and would be an anomaly. Clause (*b*) of s. 82 makes the intentional delivery of a false copy or translation of a document or a false copy of a map or plan, punishable. It will be noticed that these copies are delivered to the Registering Officers under the special provisions of ss. 19 and 21 of the Registration Act, the former of which provides that a true copy and a true translation should accompany a document in cases where such document is in a language which the Registering Officer does not understand and which is not the language of the district, and the latter of which provides that a document should contain a description of property sufficient to identify it. The offence under s. 82, cl. (*c*) relates to false personation. It will be seen from the above analysis that the primary, though not the sole object of the provisions of ss. 81 and 82 of the Registration Act is to ensure proper and correct registration of documents, and prevent an abuse of the law of registration. The limitation, that, in such cases a prosecution should be commenced by the officials concerned or with their permission, is not only reasonable but necessary. It is always open to a private person to bring the facts constituting the offence to the notice of the Registering Officer in his officer

capacity so that he can, if he thinks fit, take steps to institute proceedings and, if he does not do so, to appeal to the head of the department in the Province.

For the reasons above given I have come to the conclusion that the word 'may' in s. 83 of the Indian Registration Act should be read as equivalent to 'must be' and that that section bars the institution of proceedings by a private person without the permission mentioned in that section. I, therefore, answer the question referred to in the negative.

Heald, J.—I have had the advantage of reading the judgment of my learned brother Chari, and as his view of the meaning of s. 83 (1) of the Registration Act agrees with the view which I took in the Order of Reference and which I have seen no reason to alter as a result of the further argument before this Bench, it is unnecessary for me to deal with the case at length again. It seems clear that if any and every person has a right to institute a prosecution for an offence under the Act, then it was unnecessary for the Legislature to provide in the Act of 1866 that a prosecution for an offence under the Act might be instituted by the Registrar-General, the Branch Registrar, the Registrar, or (with the sanction of the Registrar to whom he is subordinate) the Sub-Registrar in whose territories, district, or sub-district, as the case may be, the offence has been committed. The provision that the sanction of the Registrar was necessary for the institution of a prosecution by a Sub-Registrar was clearly restrictive, and I have no doubt that the intention of the section as a whole was to restrict the power of instituting prosecutions for offences under the Act to the Registering Officers within whose area the offence was alleged to have been committed, that restriction, in the case of the lowest class of Registering Officers, being subject to the further restriction that they could not institute prosecutions without the sanction of the Registrar to whom they were subordinate. When the Act of 1866 was amended the restriction on the power of Sub-Registrars to institute prosecutions was relaxed and a further relaxation was made by the insertion of a provision that prosecutions for offences under the Act might be instituted by persons other than Registering Officers with the permission of the Registering Officers within whose area the offence had been committed.

If any and every person had the right to institute prosecutions for offences under the Act it was obviously unnecessary to provide that Registering Officers should have that power, or to provide that persons other than Registering Officers should have that power with the permission of a Registering Officer. If any meaning at all is to be given to these provisions, that meaning must be that the power to institute prosecutions under the Act was restricted to the persons mentioned in the section and that meaning is incompatible with the view that any and every person has an unrestricted right to institute such prosecutions.

I, therefore, agree that the question referred must be answered in the negative.

The case coming on for hearing before Heald, J., his Lordship delivered the following

JUDGMENT.—The Bench to which the question whether or not a prosecution for an offence under Registration Act coming to the knowledge of a Registering Officer in his official capacity can be commenced by a private person without the permission mentioned in s. 83 of the Act has answered that question in the negative, and as I see no reason to doubt that the offence of which the petitioners in this case have been convicted was such an offence, I hold that their trial for that offence was illegal *ab initio*, because the permission of the Registering Officer was not obtained.

I, therefore, set aside the convictions and sentences and direct that the applicants be acquitted, and that the fines, if paid, be refunded.

A N. A. *Conviction set aside.*

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 534 OF 1926.

November 10, 1926.

Present:—Mr. Justice Boys and Mr Justice Kendall.

UMED SINGH—ACCUSED—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Forest Act (VII of 1878), s. 32 (c)—'Breaking the ground,' whether includes mere 'clearing'—Clearing, whether criminal offence.

A person who is proved merely to have cleared

a piece of ground in a protected forest does not commit the offence of breaking the ground inasmuch as it is not possible to hold by any permissible interpretation that the word 'breaking' in the Forest Act and the notifications thereunder includes mere 'clearing.'

Criminal revision from an order of the Sessions Judge, Kumaon, dated the 25th May, 1926.

Messrs. *L. M. Roy* and *H. M. Roy*, for the Applicant.

Mr. *M. Wali Ullah*, Assistant Government Advocate, for the Crown.

JUDGMENT.—In this case the question that arises is whether the applicant broke certain ground in a protected forest in contravention of the 'Forest Act' and a notification issued thereon. The notification as issued only renders punishable the breaking of ground. It is admitted that the applicant cleared some ground. It is quite possible that in the course of clearing or after clearing the ground, he also broke it. If indeed he dug up the root of a single tree he might be held to have broken the ground, but there is no satisfactory evidence on which it could possibly legally be held that he broke any ground at all. There is some reference to a notebook of the Magistrate who inspected the ground, but any remarks in such a notebook would not be any evidence in the case.

We are, therefore, unable to hold it to be proved or to find that the fact has been legally held to be proved that there was any breaking, nor is it possible to hold by any permissible interpretation that the word 'breaking' includes mere 'clearing.' The distinction between the two words is obviously recognised in the Act. It is possible and even probable that the Government intended by the notification to forbid mere 'clearing' also, but in view of the distinction made between 'breaking' and 'clearing' in the Act, it is not possible for us to hold that where 'breaking' only is forbidden by the notification, an offence has been committed where there has been only 'clearing.'

We understand that it is not desired on behalf of the Crown that the case should be sent back for further evidence and a fresh decision thereon. The application must, therefore, be allowed. It is allowed accordingly and the conviction and the sentence of fine are set aside. If the fine has been paid, it will be refunded.

A. N. A. *Application allowed.*

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 1019 OF 1925.

January 12, 1926.

Present:—Justice Sir Charu Chunder Ghose, KT., and Mr. Justice Duval.

AKSHOY KUMAR CHAKRABURTY—ACCUSED—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 211—Giving false information to Police—Trial before giving opportunity to prove truth of information, validity of.

A person cannot be called upon to stand his trial under s. 211, Indian Penal Code, for having given false information to the Police without giving him an opportunity to prove before a Magistrate that the information given by him was true. [p. 409, col. 1.]

Rule against an order of the Sub-Divisional Magistrate, Bishnupur, dated the 9th October, 1925.

Babu *Satindra Nath Mukherji*, for the Petitioner.

Mr. *Khundkar*, for the Crown.

JUDGMENT.—The facts giving rise to this Rule shortly stated are as follows :—The petitioner before us is a postal peon. On the 30th June, 1925, he addressed a complaint to the Police through the Postmaster of the Raj Khamar Post Office against a person named Bhujendra Nath Bhattacharjee charging him with having abused and assaulted him and with having misappropriated a number of post-cards and envelopes and cash belonging to Government which were in the possession of the petitioner. The complaint was forwarded to the Sub-Inspector of Police who reported to the Magistrate on the 13th July, 1925, that the charges against Bhujendra Nath Bhattacharjee were false. The petitioner was informed on the 15th July, 1925, by the Sub-Inspector of Police that the petitioner's charges against Bhujendra Nath Bhattacharjee were false. This information, it would appear, was given to the petitioner under the provisions of s. 173 (*b*), Cr. P. C. On the 16th July, 1925, it appears, from the order-sheet, that the petitioner was called upon to appear before the Magistrate on the 29th July, 1925, to prove his case against Bhujendra Nath Bhattacharjee. Instead of a notice going to the petitioner in terms of the order of the Magistrate, dated the 16th July, 1925, it appears that a summons was issued against him as an accused person to answer a charge under s. 211, Indian Penal Code. The petitioner

did not appear before the Magistrate on the 29th July, 1925, and the case against the petitioner was adjourned to the 13th August, 1925. A second summons, again under s. 211, being issued on the 13th August, 1925, the petitioner appeared and was admitted to bail. Thereafter the petitioner was tried with having committed an offence punishable under s. 211, Indian Penal Code, and was sentenced to one year's rigorous imprisonment on the 9th October, 1925.

The petitioner's complaint before us is this that he got no opportunity whatsoever to prove his case against Bhujendra Nath Bhattacharjee, the Police having reported the case to be false on or about the 15th July, 1925, and the petitioner being called upon to answer a charge under s. 211, Indian Penal Code, immediately thereafter, although the Magistrate by his order, dated the 16th July, had required him to appear before him on the 29th July, 1925, to prove his case against Bhujendra Nath Bhattacharjee. It appears to us on an inspection of the record that the petitioner's complaint is well-founded. We think having regard to the facts of this particular case the petitioner not having been afforded any real opportunity whatsoever to prove his case against Bhujendra Nath Bhattacharjee he should not have been called on to stand his trial under s. 211, Indian Penal Code, without being given such opportunity. The learned Magistrate was of opinion that the petitioner should be afforded an opportunity to prove his case against Bhujendra Nath Bhattacharjee and to that end he adjourned the matter from the 16th July to the 29th July, 1925. As it turned out, however, by reason of some mistake or otherwise this opportunity was not given to the petitioner and as stated above the petitioner was straight-way called upon to answer a charge under s. 211, Indian Penal Code, though there was no order that he should be summoned to answer a charge under s. 211, Indian Penal Code.

On these facts we are of opinion that the conviction and sentence under s. 211, Indian Penal Code, of the petitioner must be set aside. This order is made without any prejudice whatsoever to the adoption of any subsequent proceeding under s. 211, Indian Penal Code, or any other section of the Indian Penal Code against the petitioner should it appear after he had been afforded an opportunity such as is hereinbefore referred to that his charges against Bhujendra Nath Bhattacharjee are false. The Rule is accordingly made absolute. The petitioner will be discharged from his bail-bond.

A. N. A. *Rule made absolute.*

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 403 OF 1926.

July 12, 1926.

Present:—Mr. Justice Sulaiman.

BANWARI LAL—ACCUSED—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 174—Disobedience to summons—U. P. Land Revenue Act (III of 1901), s. 147—Citation to defaulter, whether summons—Non-appearance, whether an offence.

The issue of a citation to an alleged defaulter under s. 147 of the U. P. Land Revenue Act does not involve him in any legal liability to attend and no offence under s. 174, Penal Code, is, therefore, committed by non-appearance. [p. 410, col. 2.]

Emperor v. *Bhirgu Singh* (2), followed.

Criminal Reference made by the Sessions Judge, Mainpuri.

JUDGMENT.—In this case the Government revenue due from Banwari Lal was in arrears. A citation to the defaulter to appear on the 2nd of January, 1926, in case the arrears of Government revenue were not paid soon was issued by the Tahsildar under s. 147 of the Land Revenue Act. Banwari Lal neither paid the revenue nor appeared on the date fixed. He was in consequence prosecuted and convicted by a First Class Magistrate under s. 174 of the Indian Penal Code and sentenced to pay a fine of Rs. 10 and in default to undergo ten days' simple imprisonment. Banwari Lal applied to the Sessions Judge in revision for setting aside the aforesaid order, who has referred this case to the High Court. The learned Judge has thought that the non-attendance before the Tahsildar after service of the citation did not make the applicant liable for criminal prosecution under s. 174 of the Indian Penal Code. No further reasons are given.

Section 146 of the Land Revenue Act provides for the recovery of an arrear of revenue by serving on the defaulter a writ of demand or citation to appear. Section

147 of the Act authorises the issue of a writ of demand or a citation to appear when an arrear of revenue becomes due. Section 174 of the Indian Penal Code makes the intentional omission to attend in obedience to a summons, notice, order or proclamation, proceeding from any public servant legally competent to issue the same a punishable offence. The question is whether the citation to appear does not come within the expression "summons, notice, order or proclamation." If the matter were entirely *res integra* I would have been inclined to hold that the citation was at any rate a notice, if not a summons or order, and that, therefore, its disobedience was covered by s. 174 of the Indian Penal Code. I might have sought support from the case of *Ram Bali Singh* v. *Emperor* (1) if the matter were not concluded by a recent pronouncement of a Division Bench in Government Appeal No. 821 of 1925 [*Emperor* v. *Bhirgu Singh* (2)] which is binding on me as a Single Judge.

The difficulty is created by the use of the word 'citation' in ss. 146 and 147 in distinct contrast with the use of the words 'summons, notice and proclamation', in Ch. IX of the Act. The Bench thought that the form framed by the Board of Revenue embodies both the writ of demand and the citation in one document. The form before me, however, does not appear to be strictly a writ of demand. It merely says that if the arrears of revenue mentioned therein are not paid soon, then the defaulter should appear on the date fixed. There is no time specifically stated within which the revenue is to be paid, as is required by s. 147. But undoubtedly the way in which the form has been prepared gives to the defaulter the option of either paying the arrears or appearing. It is not an unconditional notice or order to appear without fail. The form is called 'summons to appear', but that, of course, would not make it a summons, if a citation is not a summons. The learned Judges laid stress on the fact that in the N. W. P. Act XIX of 1873, s. 151, there was only a provision for the writ of demand and there was no power to issue either a citation or a summons; and in the Oudh Act XVII of 1876, s. 114, there was a provision for a writ of demand or a summons to appear, but the word 'citation' was not used; whereas in the present Act in which both the previous Acts are combined there is a provision for a writ of demand or a citation. After coming to the conclusion that the word 'citation' has been introduced advisedly and giving to it its ordinary meaning they held that it was rather in the nature of an invitation to appear than of an order to attend and that its meaning was analogous to the meaning of that word in the Probate and Administration Act (V of 1881), s. 69, and Succession Act, ss. 199 and 250. They concluded that a suitable meaning could be properly given to the word 'citation' without attributing to it the full force of a summons. In this view the learned Judges were strengthened by the use of the word 'summons' and not 'citation' in s. 193 of the Act. They accordingly held that the issue of a citation to an alleged defaulter under s. 147 of the Land Revenue Act does not involve him in any legal liability to attend and that no offence under s. 174 is committed by non-appearance.

The view taken by the Bench certainly prevents the abuse of the power to issue a citation to appear and then to arrest the defaulter, which may be an intolerable hardship. A citation may be issued to the defaulter to appear. If the defaulter does not appear he is prosecuted for non-appearance and convicted. If he does appear but is not in a position to pay up the entire arrears at once, he may be arrested and detained. The result is that if the defaulter is not in a position to pay the arrears immediately he is given the option of not appearing and being convicted and sentenced or of appearing and being arrested and detained. It may be doubtful whether such a procedure was contemplated by the Legislature when the Act was passed.

However that may be, I am bound by the ruling in the above-mentioned case, which must be deemed to be authoritative as the Government chose to appeal on a question of principle, and their appeal was dismissed.

I, accordingly, accept this reference and setting aside the order of conviction and sentence acquit the accused of the offence with which he is charged, and direct that the fine, if paid, be refunded.

Reference accepted.

A. N. A.

(1) 5 Ind. Cas. 805; 13 O. C. 55; 11 Cr. L. J. 250.
(2) 99 Ind. Cas. 60; 24 A. L. J. 1001; 28 Cr. L. J. 28.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 763 OF 1926.

November 25, 1926.

Present:—Mr. Justice Cuming and Mr. Justice Gregory.

GOPAL KRISHNA SAHA AND OTHERS—ACCUSED—PETITIONERS

versus

MATI LAL SINGH—COMPLAINANT—OPPOSITE PARTY.

Cr. P. C. (Act V of 1898), ss. 242, 537—Summons case—Omission to state particulars of offence to accused—Trial, legality of.

Omission to comply with s. 242, Cr. P. C., which requires that in summons cases the particulars of the offence shall be stated to an accused when he is brought before a Magistrate, is an illegality which vitiates the trial and not a mere irregularity which can be cured by s. 537, Cr. P. C.

Subrahmania Aiyar v. *King-Emperor* (1), relied on.

Rule against an order of the Deputy Magistrate, Barisal, dated the 7th June, 1926.

Mr. *S. K. Sen* and Babu *Sures Chandra Taluqdar*, for the Petitioners.

Mr. *N. Sen* and Babu *Asita Ranjan Ghose*, for the Opposite Party.

JUDGMENT.

Cuming, J.—The Rule which was granted by my learned brothers Rankin and Mukerji, JJ., was argued before us on four grounds:—

(1) That the provisions of s. 242 were not complied with.

(2) That no charge was drawn up and so accused was prejudiced in his defence as the case was treated as a warrant case.

(3) The provisions of s. 360 were not complied with.

(4) An order under s. 522 was passed without notice to accused.

I propose to deal first of all with the first ground.

The first point to be decided is what was the procedure followed by the Magistrate. Did he treat the case as a summons case or a warrant case?

This is not easy to determine. Admittedly the Magistrate did not apply the provisions of s. 242 and so it may be argued he treated the case as a warrant case.

But he also drew up no formal charge from which it might be inferred that he dealt with the case as a summons case.

An examination of the record, however, would show that the two sections under which summons was issued against the accused are summons cases and from this I think we must hold that the case was treated as a summons case.

That being so, the provisions applicable to a summons case would apply. These will be found in Chap. XX of the Cr. P. C. Section 242, which is one of the sections contained in the Chapter, provides that "when the accused appears or is brought before the Magistrate, the particulars of the offence of which he is accused shall be stated to him, and he shall be asked if he has any cause to show why he should not be convicted; but it shall not be necessary to frame a formal charge." Admittedly this was not done and the first question to be determined is whether this omission is an illegality or merely an irregularity curable by s. 537.

In the well-known case of *Subrahmania Aiyar* v. *King-Emperor* (1) the Privy Council held that the disobedience to an express provision as to a mode of trial cannot be regarded as a mere irregularity.

Such a disregard is obviously then an illegality.

The question then to be decided is whether the omission to state to the accused the particulars of the offence with which he is charged is an omission to comply with an express provision of the Code as to the mode of trial. It seems to me that it is. That being so, the whole trial is vitiated. The finding and sentence must, therefore, be set aside and the accused persons be ordered to be re-tried. The order under s. 522, Cr. P. C., must also be set aside. The fine, if paid, will be refunded.

Gregory, J.—I agree that the omission to comply with the provisions of s. 242 is more than a mere irregularity in procedure.

The first step in a summons case is to take the plea of the accused which has to be carefully recorded. The Magistrate then decides whether he will proceed under s. 243 or s. 244. Section 243 empowers the Magistrate to convict on an admission, while s. 244 provides that if the offence is not admitted, the evidence for the prosecution shall be taken. It is apparent, then, that as the plea of the accused cannot be taken unless (under the provisions of s. 242) the particulars of the offence are first stated to him and he is asked why he should not

(1) 25 M. 61; 5 C. W. N. 866; 11 M. L. J. 233; 3 Bom. L. R. 540; 28 I. A. 257; 8 Sar. P. C. J. 257; 2 Weir 281 (P. C.).

be convicted, the procedure under that section which is laid down in express terms, is a material and inseparable part of the procedure in the trial of a summons case.

I agree that the Rule must be made absolute.

A. N. A. *Rule made absolute.*

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 949 OF 1926.

November 22, 1926.

Present:—Mr. Justice Jai Lal.

KHUDA DAD—CONVICT—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 397—Dacoity—Deadly weapon used by some alone—Constructive liability of others.

It is only the offender who actually uses the deadly weapon that can be convicted under s. 397, Penal Code, and the constructive liability of his companions does not arise under the section.

Ilahia v. *Emperor* (1), followed.

Criminal appeal from an order of the Magistrate, First Class, exercising enhanced powers under s. 30, Cr. P. C., Rawalpindi, dated the 31st July, 1926.

Mr. *Muhamad Tufail*, for the Appellant.

Mr. *Sleem*, Government Advocate, for the Respondent.

JUDGMENT.—Khuda Dad, appellant, has been convicted under s. 397, Indian Penal Code, and sentenced to rigorous imprisonment for seven years including three months' solitary confinement and a fine of Rs. 200.

The Magistrate has found him guilty of having committed a dacoity at the house of Teja Singh on the night between the 24th and 25th December, 1925. It has been found that there were 15 or 16 culprits and that some of them were armed with revolvers which were fired to frighten the villagers from coming to the rescue of Teja Singh and that owing to Teja Singh not having given information as to the whereabouts of cash in the house on the ground that he had spent it in the purchase of grain, the dacoits were unable to obtain any property except two gold earrings which were in the ears of *Musammat* Hiran Devi wife of Teja Singh. It also appears that simple hurts were caused both to Teja Singh and *Musammat* Hiran Devi.

The above facts have been proved from the evidence of a large number of witnesses on the record and both Teja Singh and *Musammat* Hiran Devi have identified Khuda Dad as being the person who actually took the earrings from *Musammat* Hiran Devi. These earrings were discovered during Police investigation from the bed of a *kas* near the village Mator, a long distance from the village of Teja Singh on information given by the appellant.

The facts of the information given by Khuda Dad and the recovery of earrings have been established by the reliable evidence. I have, therefore, no hesitation in holding that it has been established that Khuda Dad was one of the culprits who committed the dacoity in the house of Teja Singh.

It is next contended by the learned Counsel for the appellant that Khuda Dad could not be convicted under s. 397, Indian Penal Code, as it has not been proved that he used any deadly weapon or caused grievous hurt to any of the inmates of the house or to any other person in the village. The learned Magistrate has convicted him under that section on the ground that some of the dacoits used revolvers in committing the dacoity. He has not been able to determine that it was Khuda Dad who used a revolver and, therefore, applying s. 37, Indian Penal Code, he has convicted Khuda Dad under s. 397, Indian Penal Code. In my opinion this section has no application to the facts of the present case. Section 397 provides that if, at the time of committing dacoity, the offender *inter alia* uses any deadly weapon the imprisonment with which such offender shall be punished shall not be less than seven years. It, therefore, follows that it is only the offender who actually uses the deadly weapon that can be convicted under s. 397, Indian Penal Code, and that the constructive liability of his companions in the crime does not arise under the section. This was the view taken by one of the learned Judges of this Court in *Ilahia* v. *Emperor* (1) and it clearly follows from the wording of s. 397.

I hold, therefore, that the proper section with which the appellant should have been convicted was s. 395, Indian Penal Code, and accepting this appeal I alter the conviction to one under that section and reduce the sentence to five years' rigorous imprisonment including three months' solitary confinement.

R. L. *Conviction altered.*

(1) 72 Ind. Cas. 517; 24 Cr. L. J. 405; A. I. R. 1924 Lah 409.

OUDH CHIEF COURT.

CRIMINAL REFERENCE No. 64 OF 1926.

December 16, 1926.

Present:—Mr. Justice King.

MAHADEO—ACCUSED—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 186—Resistance to execution of time-barred warrant, whether offence—Person executing such warrant, whether acts under lawful authority.

When the date fixed in a warrant of attachment has expired, the warrant is no longer in force and capable of execution, and if any person offers resistance to execution purporting to be made under the time-expired warrant, he is not guilty of an offence under s. 186, Penal Code.

Ananda Lall Bera v. *Empress* (1), *Sheikh Naseer* v. *Emperor* (2), *Abinash Chandra Aditya* v. *Ananda Chandra Pal* (3) and *Mohini Mohan Banerji* v. *Emperor* (4), followed.

Sabed Ali v. *Emperor* (5), distinguished.

Case reported by the Additional Sessions Judge, Bahraich, under s. 438, Cr. P. C.

Mr. *H. K. Ghose*, for the Crown.

JUDGMENT.—This is a Reference from the learned Additional Sessions Judge of Bahraich recommending that a conviction under s. 186, Indian Penal Code, should be set aside. The facts of the case are briefly as follows:—

One Mahadeo is a tenant of the Piagpur Estate under the Court of Wards and his rent fell into arrears. The Manager of the Court of Wards moved the Deputy Commissioner of Bahraich to have the arrears of rent recovered under ss. 39 and 40 of the U. P. Court of Wards Act as arrears of land revenue. The Deputy Commissioner issued an order on the 24th June, 1926, that the arrears should be recovered from the defaulter by attachment and sale of his moveable property. On the 25th June, 1926, the Assistant Collector issued a warrant for the attachment and sale of the defaulter's moveable property and it was specified in the warrant that the attachment should be made on or before the 5th July, 1926. The *kurk amin* was ordered to execute the warrant but failed to attach the property before the date specified. He attempted to make an attachment on the 29th of July, 1926, but the defaulter resisted the attachment whereupon the *kurk amin* reported the matter to the higher authorities with the result that the defaulter was prosecuted and convicted under ss. 186 and 504, Indian Penal Code by a Magistrate of the Second Class.

A Magistrate of the First Class exercising the power of an Appellate Court has quashed the conviction and sentence under s. 504, Indian Penal Code, but has maintained them under s. 186, Indian Penal Code.

The learned Additional Sessions Judge submits this Reference on the ground that the conviction under s. 186, Indian Penal Code, cannot be sustained because the warrant of attachment was to be executed on or before 5th July, 1926, whereas the *kurk amin* did not attempt to make the attachment until the 29th July, 1926, after the time fixed in the warrant had expired, so he was not acting under any legal authority, and the accused committed no offence in resisting the *kurk amin*. I agree with the view taken by the learned Additional Sessions Judge who relies on the cases of *Ananda Lall Bera* v. *Empress* (1) and *Sheikh Naseer* v. *Emperor* (2). I have also studied rulings to the same effect in *Abinash Chandra Aditya* v. *Ananda Chandra Pal* (3) and *Mohini Mohan Banerji* v. *Emperor* (4). These cases establish the principle that when the date fixed in a warrant of attachment has expired then the warrant is no longer in force and capable of execution, and if any person offers resistance to execution purporting to be made under the time-expired warrant then he is not guilty of any offence under s. 186, Indian Penal Code.

The Magistrate in his explanation has relied upon the case of *Sabed Ali* v. *Emperor* (5) but, as the learned Additional Sessions Judge has pointed out, this ruling can clearly be distinguished because in that case the attachment was within the time fixed by the Court which issued the warrant although it was beyond the time fixed by the *Nazir*.

In the present case the *kurk amin* sought to make an attachment after the expiry of the period fixed by the Court which issued the warrant, so he was not acting under any lawful authority.

I, therefore, accept the Reference and set aside the conviction and sentence under s. 186, Indian Penal Code. The accused is on bail. I direct that his bail-bond be dis-

(1) 10 C. 18; 13 C. L. R. 209; 5 Ind. Dec. (N. S.) 13.
(2) 5 Ind. Cas. 409; 37 C. 122; 14 C. W. N. 282; 11 Cr. L. J. 128.
(3) 31 C. 424; 1 Cr. L. J. 442.
(4) 36 Ind. Cas. 871; 1 P. L. J. 550; 3 P. L. W. 64; 18 Cr. L. J. 39.
(5) 19 Ind. Cas. 706; 40 C. 849; 14 Cr. L. J. 274; 17 C. W. N. 941.

charged and the fine, if paid, shall be refunded.

G. H. *Reference accepted.*

LAHORE HIGH COURT.

CRIMINAL CASE No. 1322 OF 1926.

November 26, 1926.

Present:—Sir Shadi Lal, KT., Chief Justice.

ISHAR DASS AND OTHERS—ACCUSED—PETITIONERS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 426—Removal of obstruction from property believed by accused to be his own—Offence.

The removal of an obstruction from property which is believed to be one's own does not constitute an offence under s. 426, Penal Code.

Case reported by the Sessions Judge, Mianwali, with his No. 45 E of 25th August, 1926.

FACTS.—Sardar Devindar Singh, a First Class Magistrate, has sentenced Ishar Dass, Surya Ram, Loka Ram and Rup Chand applicants to a fine of Rs. 10 each under s. 426, Indian Penal Code, and has further ordered that this fine should be paid to the complainants as compensation for the expenses incurred in conducting the case. Hence the application for revision.

The facts as found by the Magistrate are:—"There is a certain well named *Chah* Kotwalla in *Abadi Deh* of village Harnoli, and belongs to the complainants, who are co-sharers in the well.

On the eastern side of *Ahata Chah* of this well there is an open space eleven *karams* wide extending up to a small lane which is six *karams* in width and across which there is a *baithak* of the accused. The open space had been in possession of no particular party and was commonly used by both. Situated as it is between the *Chah* and *baithak* either of the parties are anxious to take its exclusive possession. And so the complainants taking an opportunity prepared a wall on the western side of the above referred lane to avoid all sorts of interference from the side of the accused. The complainants erected the wall in a short interval themselves and without the assistance of any mason, etc., probably to avoid trouble from the accused. They naturally on learning this fact resented it, desired to demolish the wall, and actually did remove some bricks from its top. The complainants then resisted in and brought the complaint.

For the prosecution six other witnesses besides the five complainants have been examined who prove that the wall was undoubtedly erected by the complainants and that the accused caused mischief in trying to dismantle the same.

The accused, however, also in their turn allege that the wall was prepared by them and not by the complainants and they have produced five defence witnesses to corroborate their statements.

The evidence, however, is more convincing on the side of the complainants and the fact that there is no door in the wall opening into the lane, clearly established that it could never be made by the accused. Thus it is proved that the complainants prepared the wall which the accused wanted to remove. The proper course for the latter was to have the question of ownership, etc., of the space decided by some competent Civil Court and not to have taken the law in their own hands. Thus under the circumstances and trivial nature of the offence, I order each of the accused to pay a fine of Rs. 10 or in default to suffer simple imprisonment for one week under s. 426, Indian Penal Code.

The case is submitted to the High Court for revision of sentence under s. 438, Cr. P. C., for the reason that even on the facts found by the Magistrate no offence under s. 426, Indian Penal Code, had been committed as the accused only removed an obstruction from the property which they believed to be their own and that by removing a few bricks from the wall they did not cause any wrongful loss to the complainants, *vide High Court Proceedings 31st May 1881* (1) and *In re Aniel Grove* (2). It is a very sound principle that parties should not be encouraged to resort to the Criminal Courts in cases in which the point at issue between them is one which can more appropriately be decided by a Civil Court. It is, therefore, recommended that the sentence be quashed and fine refunded. The fine has been paid.

ORDER.—The dispute between the parties relates to the ownership of a plot of land and should be decided by a Civil Court. I agree with the learned Sessions Judge that the guilt of the accused has not been

(1) 1 Weir 488.
(2) 1 Weir 488 at p. 489.

established. Accordingly I accept the recommendation made by him, and setting aside the convictions and the sentences, I direct that the fines, if paid, be refunded to the accused.

A. N. A. *Conviction set aside.*

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 573 OF 1926.

November 2, 1926.

Present:—Mr. Justice Iqbal Ahmad.

BHOORA AND OTHERS—APPLICANTS

versus

TARA SINGH AND ANOTHER—OPPOSITE PARTIES.

Cr. P. C. (Act V of 1898), ss. 133, 137, 537—Nuisance proceedings—Magistrate's duty to record evidence—Decision on local inspection on consent of parties, legality of—Consent of parties, whether confers jurisdiction—Substantive errors of law, whether cured by s. 537, Cr. P. C.

The provisions of s. 137, Cr. P. C., are imperative and where a person against whom a notice under s. 133, Cr. P. C., is issued appears and shows cause, a Magistrate should record evidence on the matter as in a summons case. Consent of parties will not justify a Magistrate in ignoring the provisions of s. 137, and vest him with jurisdiction to decide the matter simply after a local inspection.

Chandra Mondal v. *Ram Mondal* (1), followed.

The provisions of s. 537, Cr. P. C., are applicable merely to errors of procedure arising out of mere inadvertence and not to substantive errors of law. It has no application to cases where there has been a disregard of mandatory provisions of the Code.

Criminal Reference made by the Additional Sessions Judge, Meerut.

Mr. *A. Sanyal*, for the Applicants.

Dr. *K. N. Katju*, for the Opposite Parties.

JUDGMENT.—This is a Reference under s. 438 of the Cr. P. C. by the learned Additional Sessions Judge of Meerut, asking this Court to set aside the order dated the 15th of July, 1926, passed by a Magistrate of the First Class in proceedings under s. 133 of the Cr. P. C., and to direct the learned Magistrate to proceed according to the provisions of s. 137 of the Cr. P. C. The facts that have led to this Reference are shortly these. An application was filed by two persons Tara Singh and Balwant Singh under s. 133 of the Cr. P. C. Notices were issued to the opposite parties, who were the applicants before the learned Sessions Judge. The opposite parties appeared and denied the allegation of the applicants that any encroachment had been made by them on a public way. In short, they showed cause against the order drawn up by the learned Magistrate in accordance with the provisions of s. 133 of the Code. Nothing further appears to have been done in the case until the 7th July, 1926, on which day the parties stated that they would be ready to abide by the decision of the Court after the Court had inspected the locality. The learned Magistrate then inspected the locality and on the 15th July made his order absolute. Section 137 (1) provides that if cause is shown against the order under s. 133 "the Magistrate shall take evidence in the matter as in a summons case." The provisions of s. 137 are imperative and as in this case the learned Magistrate has not followed the procedure prescribed by that section, his order is bad in law. When the opposite party appeared before him and showed cause and when they alleged that what was claimed as a public pathway was not so, the learned Magistrate should have recorded evidence on the matter of the complaint as in a summons case. He was not justified in ignoring the clear provisions of s. 137 of the Code and in consenting to act, so to say, as an arbitrator and to decide the matter simply after a local inspection. Consent of the parties or waiver did not vest him with a jurisdiction to proceed in the manner that he did. This was the view taken in the case of *Chandra Mondal* v. *Ram Mandal* (1).

It has been argued by Dr. Katju who has appeared to oppose this reference, that the irregularity, if any, committed by the learned Magistrate is cured by s. 537 of the Cr. P. C., and that I ought not to interfere with the learned Magistrate's order unless I am satisfied that the irregularity has occasioned a failure of justice. It is to be noted that the provisions of s. 537 of the Code are applicable merely to errors of procedure arising out of mere inadvertence, and not to substantive errors of law. Section 537 has no application to cases where there has been a disregard of the mandatory provisions of the Code.

For the reasons given above I accept the Reference, set aside the order of the learned Magistrate, dated the 15th July, 1926, and direct that he should proceed to dispose of the case according to law.

A. N. A. *Reference accepted.*

(1) 40 Ind. Cas. 738; 21 C. W. N. 926; 25 C. L. J. 319; 18 Cr. L. J. 738.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 1015 OF 1926.

November 29, 1926.

Present :—Mr. Justice Dalip Singh.

KHUSHDIL AND ANOTHER—CONVICTS—APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 75, application of —Previous conviction not recent—Enhanced punishment.

A Court may decline to order enhanced punishment under s. 75, Penal Code, where a long period has elapsed since the previous conviction.

Criminal appeal from an order of the Magistrate, First Class, exercising enhanced powers under s. 30, Cr. P. C., Jullundur, dated the 26th August, 1926.

Mr. *L. Saunders*, for the Appellants.

JUDGMENT.—Khushdil and Ghulam Rasul appellants have been sentenced under s. 457/75, Indian Penal Code, for breaking into the house of Aziz Din, Sub-Inspector, and stealing a belt and under ss. 457/511, Indian Penal Code, for attempting to break into the house of Sharif on the same night. They have been sentenced to seven years' rigorous imprisonment each and also under s. 565, Cr. P. C., to report to the Police for five years.

The facts as established by the prosecution evidence are that Sharif, P. W. No. 2, woke up on hearing a noise and found the two appellants endeavouring to break into his house. He called certain of his neighbours and proceeded to try and catch them. He also went to the Sub-Inspector and there it was discovered that the Sub-Inspector's house had been broken into previously and his property was lying scattered about. The appellants were finally arrested in a field in which they had concealed themselves. At the time of their arrest they seem to have offered some resistance and injured though slightly one Faqir Mohammad Constable. The appellants were found in possession of an *ala naqab* and a *takwa* respectively. Also Khushdil produced Ex. P-15, the belt of the Sub-Inspector, next morning from a field where it had been buried.

The evidence of Sharif, Barkat Beg and others leaves no doubt that these appellants were endeavouring to break into the house of Sharif. Counsel for the appellants contends that the evidence does not amount to anything more than proof of preparation for burglary. I do not see that where the appellants are found actually endeavouring to break into a house how it can be held that this was only a preparation and not an attempt.

I, therefore, consider that the accused have been rightly convicted under s. 457/511.

As regards the burglary in the house of the Sub-Inspector the production of the belt by Khushdil in the circumstances of this case is sufficient to prove that he was one of the burglars and the fact that Ghulam Rasul was found in his association shortly afterwards endeavouring to break into the house of Sharif and the fact that Ghulam Rasul alone had an *ala naqab* seem to point irresistibly to the inference that Ghulam Rasul was also the companion of Khushdil. I, therefore, consider that the appellants have been rightly convicted under s. 457.

There remains the question of sentence. I find that Ghulam Rasul has two previous convictions: one on 23rd April, 1913, under s. 380, Indian Penal Code, and one on 23rd May, 1922, under s. 411/75, Indian Penal Code Khushdil has the following previous convictions:—

1. On 5th June, 1901, under s. 411, Indian Penal Code.
2. On 22nd December, 1905, under s. 379, Indian Penal Code.
3. On 11th April, 1908, under s. 379, Indian Penal Code.

I do not consider, in view of the length of time that has elapsed in the case of Khushdil from his last conviction, that there is any need to apply s. 75 and I consider also in the case of Ghulam Rasul that though s. 75 might be applied there is no reason to distinguish his case from that of Khushdil. I, therefore, accept the appeal to this extent that I reduce the sentence to five years' rigorous imprisonment in each case and I further order that under s. 565, Cr. P. C., the appellants should notify their residences as provided by law after release for a period of three years from the date of the expiration of their sentences. The appeal is otherwise dismissed.

K. L. *Appeal partly accepted.*

A. N. A.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 655 OF 1924.

June 18, 1926.

Present:—Mr. Justice Fawcett and Mr. Justice Madgavkar.

BALA ANNA GURAV—PLAINTIFF—APPELLANT

versus

AKUBAI BABU GURAV AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Adoption—Widow of co-parcener adopting while widow of another co-parcener is pregnant—Adoption, validity of—Son in the womb, rights of.

One of two co-parceners died leaving a pregnant widow. The other co-parcener died subsequently and his widow without his authority adopted a boy. The other widow gave birth to a son after the adoption:

Held, that the adoption was void inasmuch as under Hindu Law a son is legally in existence not only from the date of his birth but also from the date of his conception. [p. 417, col. 2; p. 418, col. 2.]

Second appeal from the decision of the Joint First Class Subordinate Judge, A. P., at Sholapur, in Appeal No. 170 of 1921, confirming the decree of the Subordinate Judge, at Sangola, in Civil Suit No. 138 of 1919.

Mr. *S. Y. Abhyankar*, for the Appellant.

Mr. *S. R. Parulekar*, for the Respondent No. 1.

JUDGMENT.

Madgavkar, J.—The question in this appeal is whether the adoption of the plaintiff-appellant Bala by Tanubai, widow of Anna Gurav, entitles him to a share in the joint family property of Anna and his predeceased brother Babu.

These two brothers formed a joint Hindu family. Babu died on October 22, 1918, leaving a widow Akubai *enceinte*. Anna died on November 4, 1918, leaving a widow Tanubai. On February 27, 1919, Anna's widow Tanubai adopted her brother, the plaintiff-appellant, without the consent of Babu's widow Akubai, who gave birth, on April 1, 1919, to Krishna, defendant-respondent No. 1. The appellant sued Krishna for the joint property, alleging that the family was divided in status before Anna's death and that Anna had given Tanubai authority to adopt. Krishna died *pendente lite* and is represented by his natural mother Akubai. Defendants-respondents Nos. 2 and 3 were tenants.

The lower Courts held, and in our opinion rightly, that the family was not divided in status and that Tanu had no authority from her husband, Anna, to adopt the plaintiff, and dismissed the suit. The plaintiff appeals.

It is contended in appeal for the appellant that even on these findings Tanu's adoption of the plaintiff is valid in law. It is argued that Tanu was the widow of the last full owner Anna and had power to adopt [*Payapa Akkapa Patel* v. *Appanna* (1)] notwithstanding the pregnancy of Akubai, and Krishna should be taken to be non-existent till he was actually born later. And we are asked to extend to a Hindu widow, even the widow of a co-parcener, the power of a Hindu father to adopt, notwithstanding the pregnancy of his wife, affirmed in *Hanmant Ramchandra* v. *Bhimacharya* (2).

The widow's powers of adoption in the Maratha country, whence the present appeal comes, are larger than those in other parts of India; and reliance is placed on the observations of their Lordships of the Privy Council in *Yadao* v. *Namdeo* (3) and the observation of Shah J., in the recent Full Bench decision in *Ishvar Dadu* v. *Gajabai Babaji* (4).

For the respondents it is argued that the right of a widow in a joint Hindu family is in this Presidency still subject to the limitations laid down in *Ramji* v. *Ghaman* (5) which was held by the Full Bench, in the recent case last referred to, not to have been overruled by *Yadao* v. *Namdeo* (3) and in Hindu Law as in other systems of jurisprudence, a son is legally in existence not merely from the date of his birth but also from the date of his conception. If so, not Anna, but Krishna in the womb was the last male holder and Anna's widow Tanu had no legal power to adopt the appellant.

The question for decision is not a hypothetical question as to the validity of the adoption of the appellant by Tanubai, if the other widow Akubai had not been *enceinte* or had given birth to a girl; but is whether Tanu's adoption of the appellant without authority from her deceased husband Anna and without the consent of the other widow Akubai and though Akubai's son Krishna was in the womb, is valid so as to entitle the appellant to a share in the joint family property.

(1) 23 B. 327; 12 Ind. Dec. (N. S.) 217.

(2) 12 B. 105; 12 Ind. Jur. 274; 6 Ind. Dec. (N. S.) 556.

(3) 64 Ind. Cas. 536; 48 I. A. 513; 24 Bom. L. R. 609; 17 N. L. R. 145; 30 M. L. T. 53; 26 C. W. N. 393; 42 M. L. J. 219; 15 L. W. 565; 20 A. L. J. 481; 49 C. 1; A. I. R. 1922 P. C. 216 (P. C.).

(4) 96 Ind. Cas. 712; 28 Bom. L. R. 782; A. I. R. 1926 Bom. 435; 50 B. 468 (F. B.).

(5) 6 B. 498; 6 Ind. Jur. 587; 3 Ind. Dec. (N. S.) 787 (F. B.).

To this question the answer is, in my opinion, in the negative. No text or authority is shown in favour of the validity of such an adoption. Its validity could only rest on Anna's being the last full owner, if he were one. But he was not, unless Akubai's child had proved to be a girl and not, as it turned out, a boy. There is no authority for the proposition that either in a case such as the present, or broadly and in general, Hindu Law treats a child in the womb as non-existent. On the contrary, a gift to an infant in the womb is valid in Hindu Law: *Jutendramohan Tagore* v. *Ganendramohun Tagore* (6). An alienation by a father made, while the joint son is in the womb, can be successfully contested by the latter after his birth, implying that his co-parcener's rights commence from conception: *Sabapathi* v. *Somasundaram* (7). And the provisions of a Will made by an uncle, while his joint nephew is in the womb, can be defeated by the birth of the latter necessitating a similar implication: *Bacho* v. *Mankoribai* (8).

The general rule in most systems of jurisprudence, and particularly in cases of succession and inheritance, is exactly the contrary and treats infants *en ventre sa mere* as existing: "An infant *en ventre sa mere*...is supposed in law to be born for many purposes. It is capable of having a legacy, or a surrender of a copyhold estate, made to it. It may have a guardian assigned to it; and it is enabled to have an estate limited to its use, and to take afterwards by such limitation, as if it were then actually born" (Blackstone Com. Vol. 1, 130, 18th Edn.). The English Law follows in this respect the Roman Law, which allowed even the appointment of a *curator ventris* to look after infants in the womb: see also *In re Wilmer's Trusts*, *Moore* v. *Wingfield* (9).

Into the general question of the widow's duty to adopt from pious motives and her inherent right corresponding, I do not think it necessary to enter. The right of a widow in a joint Hindu family from the Maratha country is still subject to the limitations in *Ramji* v. *Ghaman* (5) according to the view of the majority of the Full Bench in *Ishvar Dadu* v. *Gajabai Babaji* (4) which held that *Ramji* v. *Ghaman* (5) has not been overruled by *Yadao* v. *Namdeo* (3). I have detailed my reasons for that view in my judgment in the Full Bench decision. Shah, J.'s judgment is to the same effect, and I cannot find anything in it to uphold the contention of the present appellant.

For these reasons, I am of opinion, that Krishna was in law a co-parcener from the date of his conception and that the adoption of the appellant by Krishna's aunt Tanubai, while Krishna was in the womb, without the authority of her husband Anna was not valid, and gave the appellant no interest in the joint family property. The appeal fails and I would dismiss it with costs.

Fawcett, J.—I agree.

A. N. A. *Appeal dismissed.*

(6) 9 B. L. R. 377; 18 W. R. 359; I. A. Sup. Vol. 47 (P. C.).

(7) 16 M. 76; 2 M. L. J. 244; 5 Ind. Dec. (N. S.) 760.

(8) 31 B. 373; 9 Bom. L. R. 646; 11 C. W. N. 769; 10 C. L. J. 1; 17 M. L. J. 343; 2 M. L. T. 295; 34 I. A. 7 (P. C.).

(9) (1903) 72 L. J. Ch. 378; (1903) 1 Ch. 874; 51 W. R. 395; 88 L. T. 379.

RANGOON HIGH COURT.

CIVIL MISCELLANEOUS APPEAL No. 198 OF 1925.

August 9, 1926.

Present:—Sir Guy Rutledge, KT., Chief Justice, and Mr. Justice Carr.

ABDUL SATTAR AND OTHERS—PLAINTIFFS APPELLANTS

versus

CHI DOE RHI—DEFENDANT—RESPONDENT.

C. P. C. (Act V of 1908), s. 47, scope of—Dispute between parties arrayed on the same side, whether falls within s. 47.

Section 47, C. P. C., is not confined in its operation to questions relating to the execution, discharge or satisfaction of the decree which arise between parties who are opposed to each other in the suit as the plaintiff or his representative-in-interest on the one side and the defendant or his representative-in-interest on the other, but applies also to such disputes between parties arrayed on the same side. [p. 419, col. 2.]

Thoppai Vedaviasa Aiyar v. *Madura Hindu Sabha Nidhi Co., Ltd.* (3), relied on.

Raynor v. *Mussoorie Bank, Ltd.* (1), dissented from.

Mr. *Lambert*, for the Appellants.

Mr. *Kyaw Htoon*, for the Respondent.

JUDGMENT.—In Civil Regular Suit No. 1 of 1922, one Abdul Rahman and eight others sued the heirs and legal representatives of one Hla Thaw for redemption of certain lands in Rathedaung, which

had been mortgaged, and, in that suit, he joined the first appellant and Nyo Tun Aung as 6th and 7th defendants as purchasers of the lands from some of the heirs of the mortgagee and as being in possession.

It appears that the original mortgagee, Hla Thaw, died about 1917 leaving as heirs Mi San Hla Pru, widow, Aung Gyaw Pru, son, and Chi Doe Rhi son. Defendants one to four are the heirs of Aung Gyaw Pru, and Chi Doe Rhi is the 5th defendant. The 5th defendant does not appear to have filed a written statement, but he was represented at the trial and was witness No. 1 for the defence. He also acted as agent for the 1st defendant, his brother's widow. On the 5th July 1922, the District Court passed judgment giving a preliminary decree in favour of the plaintiffs for redemption as under the original mortgages. The decree, which is dated the 25th July, 1922, fixed the redemption sum for principal and interest at Rs. 5,451-8-0 and a final decree was passed on the 8th October, 1924, as the redemption money was duly deposited in Court. On the 1st April, 1925, the present appellant petitioned the Court to have the redemption money paid out to them stating that the 1st to 4th defendants had sold their right, title and interest in the suit lands to them and that the 5th defendant, Chi Doe Rhi (the present respondent), had no right, title or interest in the suit lands as he had previously got his share at the partition of Hla Thaw's estate. The respondent objected on the ground that the money deposited belonged to his father's estate and, as his mother is dead, the estate is to be divided equally between his two sons, and that, as the appellants purchased the lands from the legal representatives of his brother, Aung Gyaw Pru, they can only claim half.

By the order appealed from the District Judge dismissed the application on the ground that the question arising should be decided in a regular suit. The question for our decision is whether the question comes under s. 47 of the C. P. C. If it does, then, whether convenient or otherwise the Court executing the decree must determine the question, and a separate suit is barred.

It was not seriously disputed by respondent's Advocate that the question would come under the words "relating to the execution, discharge or satisfaction of the decree;" and we are of opinion that the payment of the money deposited in Court in discharge of the decree by the Court to the party entitled to receive it must be considered a question relating to the satisfaction of the decree. But it has been urged on behalf of the respondent that the question must be one between parties who were opposed to each other in the main suit as the plaintiff or his representative-in-interest on the one side and the defendant or his representative in-interest on the other side; and reliance is placed on certain observations by a Bench of the Allahabad High Court in *Raynor* v. *Mussoorie Bank, Ltd.* (1). On page 686*, the learned Judges remarked: "It is sufficient here to observe that an application cognizable under that section must be an application between the parties, that is to say, between the parties arrayed against each other as decree-holder of the one part, and judgment-debtors or their representatives of the other." In our opinion this remark was *obiter dictum* and not necessary for the decision in that case because Goodall was not a party to the suit at all but alleged that he was the purchaser for value from Raynor, the judgment-debtor. Most of the other cases cited, such as *Maganlal Mulji* v. *Doshi Mulji Bhaichand* (2) do not touch the question before us but are whether a person, not a party to the suit, can be regarded as a representative of the party. If the Legislature had intended any restrictive meaning to be imposed upon the words "parties to the suit," we would have expected this meaning to be clearly expressed.

A similar question came up for argument before a Bench of the Madras High Court in the case of *Thoppai Vedaviasa Aiyar* v. *Madura Hindu Sabha Nidhi Co., Ltd.* (3) in which the learned Judges referred to *Raynor's case* (1) and certain others and observed: "But although these cases do contain language susceptible of an interpretation, which may support the appellant's argument, that argument was not what was being considered by the learned Judges. For in each of these cases the matter under

(1) 7 A. 681; A. W. N. (1885) 204; 4 Ind. Dec. (N. S.) 880.
(2) 25 B. 631; 3 Bom. L. R. 255.
(3) 77 Ind. Cas. 148; 45 M. L. J. 478; 18 L. W. 311 (1923) M. W. N. 662; A. I. R. 1924 Mad. 365.

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consideration was in dispute between a judgment-debtor and his representative or a person on whom his interest had in some way devolved and not (as here) between two judgment-debtors, whose interests were absolutely independent. It is in our opinion clear on principle that no such rule as the 8th respondent's learned Vakil contends for can be laid down. In the case for instance of a partition suit the judgment-debtors may very well find their interests opposed when delivery is attempted, although up to the final decree they had no cause for complaint against each other and similarly, in administrative or partnership suits. We can see no reason for acceding to the suggestion that we should limit the scope of s. 47 in the way suggested, when to do so would exclude from its purview the decision of many of the questions, which must inevitably arise only after the decree and when the result would be to frustrate the object of the section recognised by the Privy Council in *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (4) *viz.*, the cheap and speedy settlement of all disputes at the stage of execution."

With this statement we find ourselves in respectful agreement. No doubt, in that case the question was as to the order in which items of property were to be sold in execution of a decree on a mortgage, but the principle there laid down is equally applicable, in our opinion, to the present case where the question is as to who is entitled to the proceeds of the mortgage-decree. For these reasons we are of opinion that the appellants' application fell within s. 47, C. P. C. The appeal must consequently be allowed with costs: Advocate's fee five gold *mohurs*. The order of the District Court is set aside and the case is remanded to that Court for hearing and determination of the question in issue.

Case remanded.

A. N. A.

(4) 19 C. 683; 19 I. A. 166; 6 Sar. P. C. J. 209; 9 Ind. Dec. (N. s.) 898 (P. C.).

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL No. 1097 OF 1926.

October 11, 1926.

Present:—Mr. Justice Coldstream.

NAZIR HUSSAIN—DEFENDANT—APPELLANT

versus

NATHU—PLAINTIFF—RESPONDENT.

C. P. C. (Act V of 1908), O. XXIII, r. 1—Withdrawal of suit with liberty to bring fresh suit on payment of costs—Failure to pay costs, effect of—Fresh suit, whether maintainable—Courts, duty of.

Where a Court allows the withdrawal of a suit with liberty to bring a fresh suit on payment of costs to the defendant but neither makes the payment of costs a condition precedent to the institution of the suit nor fixes a time for payment thereof, a fresh suit filed without paying costs is not bad *ab initio* but can be entertained if costs are paid before it comes on for trial. [p. 421, cols. 1 & 2.]

[Case-law referred to.]

It is important that Courts, when giving permission to withdraw with liberty to bring a fresh suit, should pass an order limiting the time within which costs are to be paid and should direct that on failure to pay within that time the original suit will stand dismissed with costs. [p. 421, col. 2.]

Miscellaneous second appeal from an order of the District Judge, Sialkot, dated the 10th February, 1926, reversing that of the Subordinate Judge, Second Class, Sialkot, dated the 10th November, 1925.

Chaudhri *Zafarulla Khan*, for the Appellant.

Mr. *Muhammad Monir*, for the Respondent.

JUDGMENT.—The plaintiff-respondent brought a suit against the defendant-appellant. On the 11th June, 1925, the Court passed an order allowing him to withdraw the suit "and to bring a fresh suit provided he pays Rs. 20 costs to the defendant." Without paying any costs the plaintiff instituted the fresh suit 5 days later. No objection was taken by the defendant until the case came on for hearing of evidence, on which date an objection was accepted by the Court which dismissed the suit with costs. The plaintiff appealed and on 10th February, 1926, the learned District Judge of Sialkot, accepting the appeal remanded the case for re-decision on the merits under O. XLI, r. 23 of the C. P. C., the plaintiff to pay the costs in the first hearing.

Against this order of the District Judge the defendant has instituted the present appeal in which the only point for decision is whether in the circumstances the second suit ought to be allowed to pro-

ceed. Mr. Zafarullah who argues the appeal relies on the rulings of the Madras High Court published as *Robert Fischer* v. *Nagappa Mudaly* (1), *Subal Chandra* v. *Mosaraf Ali* (2) and *Goolapudi Seshayya* v. *Nadendla Subbiah* (3). The first of these decided in 1909 deals with a case in which permission to withdraw had been granted on condition that costs were paid within a certain date and decided that as costs had not been paid within the period fixed the suit was barred. In 1917 this rule was followed by the Calcutta Court in *Subal Chandra* v. *Mosaraf Ali* (2) in a case in which the wording of the order granting permission to bring a fresh suit was found to mean clearly that the payment of costs was to be a condition precedent to the filing of a fresh suit. In *Goolapudi Seshayya* v. *Nadendla Subbiah* (3), decided in 1924, a Single Bench of the Madras Court has apparently held that where an order of payment of costs was passed under the provisions of r. 1 (2) (*b*) of O. XXIII of the C. P. C., no fresh suit can be entertained until the costs have been paid whether the order fixed a date for payment or so worded its order as to leave it doubtful whether payment of costs was to be a condition precedent to the institution of the suit or not. It is to be noted that in the case dealt with by that judgment the fresh suit had been wholly tried and decreed without payment of the costs ordered.

The Calcutta Court has, however, distinguished between cases where the order of costs clearly made the payment of costs a condition precedent to the institution of a fresh suit or fixed a period for payment and case where payment of costs before institution or within a period was not definitely directed. The earliest of its rulings cited for the respondent *Abdul Aziz Molla* v. *Ebrahim Molla* (4) dealt with a case in which the circumstances appear to have been very similar, as regards the point under discussion, to those of the present case and the Court there held that the fresh suit was not bad *ab initio*, but could be entertained if costs were paid before the suit came on for trial (In the present case the objection that costs were not paid was not raised until before evidence was heard and it was then pleaded for the plaintiff that he was ready to pay costs then). The ruling was followed by Division Benches of the same Court in *Gopi Lal* v. *Naggu Lal* (5) and *Sadhu Charan Tewari* v. *Baikuntha Nath Madak* (6). In *Subal Chandra* v. *Mosaraf Ali* (2) the Calcutta Court pointed out that the question whether a fresh suit can or cannot be instituted before costs ordered under O. XXIII, r. 1 are paid turns solely upon the construction of the order passed under that rule. It held that in that case it construed the order to mean that payment of costs was a condition precedent to the institution of a fresh suit. In spite of its previous rulings the Madras Court apparently expressed in *Dasarthy Naidu* v. *Palala Kumaramull* (7) their approval of the line adopted by the Calcutta Court in such cases.

I think that the learned District Judge was right in following the Calcutta ruling and in construing as he did the order passed in this case under O. XXIII, r. 1, C. P. C., and I dismiss this appeal with costs accordingly.

As pointed out by the Calcutta and Patna Courts in *Sadhu Charan Tewari* v. *Baikuntha Nath Madak* (6) and *Kuldip Singh* v. *Kuldip Chowdhuri* (8) respectively much difficulty is given to the Courts by the incompleteness of orders passed under O. XXIII, r. 1. It is important that Courts when giving permission to withdraw with liberty to bring a fresh suit should pass an order limiting the time within which costs are to be paid and should direct that on failure to pay within that time the original suit is dismissed with costs.

R. L. *Appeal dismissed.*

(1) 6 Ind. Cas. 288; 33 M. 258; 7 M. L. T. 226.
(2) 38 Ind. Cas. 476.
(3) 82 Ind. Cas. 499; 20 L. W. 642; 47 M. L. J. 646; (1924) M. W. N. 887; A. I. R. 1924 Mad. 877; 35 M. L. T. 62.
(4) 31 C. 965.
(5) 10 Ind. Cas. 6; 14 C. L. J. 105; 15 C. W. N. 998.
(6) 23 Ind. Cas. 210; 19 C. L. J. 529.
(7) 45 Ind. Cas. 969; 7 L. W. 557; (1918) M. W. N. 427; 24 M. L. T. 311.
(8) 44 Ind. Cas. 79; 3 P. L. J. 63; 4 P. L. W. 134.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 144-B OF 1925.

August 16, 1926.

Present:— Mr. Kinkhede, A. J. C.

EMPEROR—APPLICANT

versus

GULABRAI HARDAYAL—

NON-APPLICANT.

Berar Municipal Laws of 1886, s. 41 (1) A (b)—Basim Municipality—Tax on cotton bales and bojas *—Hyderabad Residency Order No. 112*—Dhande patti *—Maximum of Rs. 500, whether affects tax on bales and* bojas.

The maximum of Rs. 500 fixed by proviso 1 to r. 1 of the Residency Order No. 112 of 1899 is not applicable to the new tax imposed under Notification No. 456 of 1913, by the Municipality of Basim, on the ginning and pressing of cotton within the limits of the Municipality. [p. 424, col. 1.]

Reference made by the Deputy Commissioner, Akola, to Judicial Commissioner's Court under s. 83 (2), C. P. Municipalities Act, 1922.

Mr. *M. B. Niyogi*, for the Applicant.

Mr. *A. V. Khare*, for the Non-Applicant.

ORDER.—This is a Reference made by the Deputy Commissioner, Akola, under s. 83 (2) of the C. P. Municipalities Act (Act II of 1922), as applied to Berar by Notification No. 58-I dated the 22nd January, 1924, of the Government of India Foreign and Political Department of the Governor General-in-Council. It arises out of an appeal preferred by non-applicant Gurupratapsingh proprietor of Gulabrai Hardayal Ginning and Pressing Factory, Basim. I may briefly state the circumstances which necessitated this reference.

Within the limits of the Municipal Committee of Basim the non-applicant has a Ginning and Pressing Factory. A tax on professions and trades was imposed by the Municipal Committee under the authority of the Residency Order No. 112, dated 18th March, 1899, under s. 41, sub-s. 1-A (*b*) of the Berar Municipal Law of 1886, with effect from 1st April, 1899, on all traders practising their calling within the Municipality. Consequently the non-applicant's income from all trades including the trade of ginning and pressing cotton became taxable under the said order. By proviso 1 of r. 1 of the said Order Rs. 500 per annum was fixed as the maximum tax leviable from a trader. By provisos 2, 3 and 4 certain deductions and exclusions were ordered but with them we are not concerned for the purposes of the present reference.

In the year 1913 the same Municipality, with the previous sanction of the Chief Commissioner conveyed by Notification No. 456, dated the 29th April, 1913, directed the imposition with effect from 1st April, 1913, of a new tax on the ginning and pressing of cotton under s. 41 (1) A (*b*) of the Berar Municipal Law of 1886 to be levied from all persons carrying on within the limits of the Basim Municipality the trade of ginning of cotton and pressing of the same into bales. This new tax was levied on the outturn of the factory and is locally known as tax on bales and *bojas*, whereas the old tax is known as a tax on profession and trades technically called *dhande patti*. When this new tax was imposed the Municipality with the sanction of the Chief Commissioner exempted so much of the income of a trader as was taxable under the tax on ginning and pressing of cotton from the old tax on profession and trades. This evidently was for avoiding double taxation of the same income under several heads. There was some change in the rates to be levied with effect from 1st April, 1924, as the result of subsequent resolutions and notifications.

For the year 1924-25 the non-applicant had to pay (1) Rs. 90 on account of the tax on profession and trade leviable under the Residency Order No. 112, dated 18th March, 1899, and (2) Rs. 1,057 on account of the tax on ginning and pressing of cotton under the Notification No. 456, dated 29th April, 1913. These payments which amounted to Rs. 1,147 were made by him under protest. He, therefore, applied for a refund of Rs. 647 to the Municipal Committee on the ground that the maximum of Rs. 500 fixed by proviso 1 to r. 1 of the Residency Order No. 112, dated 18th March, 1899, was applicable to the new tax imposed under Notification No. 456, dated 29th April, 1913, also. The application was rejected by the Municipal Committee by an order dated 29th June, 1925. The non-applicant went up in appeal to the Deputy Commissioner under s. 83 of Act II of 1922 as applied to Berar. When the matter came up for hearing before the Deputy Commissioner he called upon the Municipal Committee to show cause why the refund asked for should not be ordered to be made. After hearing the arguments he apparently thought that the matter was not clear and he entertained reasonable doubt and has consequently referred the point of the applicability of the limit of the maximum

tax of Rs. 500 to the new tax for the decision of this Court.

Very elaborate arguments have been addressed at the Bar before me. It will be noticed that the non-applicant does not deny his liability to be taxed separately under the Residency Order No. 112 of 1899 and the Notification No. 456 of 1913 as amended by Notification No. 1609-784 VIII of 1923. His case before the Deputy Commissioner was a simple one, namely, that the Notification by which the new tax was levied must be read subject to proviso 1 of r. 1 of the Hyderabad Residency Order No. 112 of 1899, whereas the contention of the Municipal Committee was that proviso 1 to r. 1 of the Residency Order does not apply to the new tax imposed by the Notification of 1913 in the absence of express words to that effect. In my opinion the contention of the Municipal Committee is correct. There is nothing in the Notification No. 456 of 1913 which leads me to think that the Municipal Committee intended to incorporate into it the limit fixed by the 1st proviso to r. 1 of the Residency Order No. 112 of 1899. Where it is clear that the object of the Notification imposing the new tax was to secure increased income by taking as the basis for the taxation the total outturn of a ginning or pressing factory instead of its profits one cannot impute to the Municipal Committee in the absence of express words to that effect an intention to import into it any limitations as to the maximum tax so leviable.

While applying Act II of 1922 to Berar sub-ss. (6) and (7) were added to s. 66 of the Act by the Government of India's aforesaid Notification No. 58-I. dated 22nd January, 1924. Sub-section (6) directs that any tax imposed in a Municipality before the date on which this Act comes into force shall continue in operation notwithstanding that it is not a tax specified in sub-s. (1) and sub-s. (7) says that the amount or rate of a tax to which sub-s. (6) applies may not be varied by the Municipal Committee. Section 66 of Act II of 1922 so amended now takes the place of old s. 41 of the Berar Municipal Law of 1886 and we must, therefore, look to the new section for determining the question under reference and not to the old s. 41. All taxes levied by the Municipalities in Berar whether they be specified under sub-s. (1) of s. 66 or not must by virtue of sub-s. 6 be deemed to be legally and separately leviable by them. I am not at all impressed by the argument of the non-applicant based upon the use of the singular 'a tax' in s. 66 (1) cls. (*a*) to (*d*) and (*h*) to (*p*) of Act II of 1922 in view of sub-s. (6) added by the Government of India while extending the Act to Berar. Moreover, there is nothing in the section to prevent the Municipal Committees taxing every calling, trade, profession etc., separately.

Sub-section (2) of s. 66 of the said Act further shows that the Local Government may regulate the imposition of taxes and impose maximum amounts or rates for any tax. The position, therefore, is this. We have now (1) a general tax on professions and trades levied under Hyderabad Residency Order No. 112 of 1899 fixing Rs. 500 as the maximum amount by operation of proviso 1 to its r. No. 1, and (2) a special tax on ginning and pressing of cotton where no such maximum is expressly fixed. By exempting so such of the income of a trader as is assessable to the special tax on ginning and pressing of cotton from payment of the general tax on professions and trades, the Municipal Committee must be deemed to have abolished the general tax to that extent with the sanction of the Local Government as required by law. This shows that the Municipal Committee wanted to give a limited concession only and did not think it proper to incorporate in the Notification imposing the special tax any further concessions by fixing the limit of the maximum of Rs. 500 which applied to the old general tax, nor was the permission of the Local Government sought to make the special tax also subject to the same proviso as the general tax. Moreover, sub-s. (7) gives the Committee no power to vary the amount or rate of the tax to say that the special tax is subject to the maximum of Rs. 500 tantamounts to varying the *amount* of the tax.

To my mind the basis of taxation under the Residency Order No. 112 of 1899 was fundamentally different from the basis taken from the imposition of the special tax on ginning and pressing of cotton. In one the tax is to be levied on the net profits of the profession in the other it is to be calculated on the outturn of *bojas* and bales of cotton ginned or pressed in any factory of the trader. The evident object was to realize larger income from the latter special tax than was made from the general

tax. The new special tax made no allowance for any deductions on account of losses etc., as the former general tax did. The experience of the Municipality apparently was that it was cheated out of its income by the traders' pleas of losses being in excess of their profits in the several professions or callings they practised including one of ginning and pressing cotton within the limits of the Municipality and the Municipality wanted to provide a remedy against the same. This circumstance also negatives the application of the maximum limit to the special tax.

For the above reasons my decision on the Reference is that the operation of the Notification No. 456, dated 29th April, 1913, is not subject to the maximum of Rs. 500 imposed by proviso 1 to r. 1 of the Hyderabad Residency Order No. 112, dated the 18th March, 1899, and that the non-applicant is not entitled to claim a refund of Rs. 647 from the Municipal Committee. The papers be returned with a copy of this order.

G. R. D.

Reference answered accordingly.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 17 OF 1924.

November 9, 1926.

Present :—Mr. Justice Dalal and Mr. Justice Pullan.

IBRAHIM AND ANOTHER—DEFENDANTS—APPELLANTS

versus

Lala JAGDISH PRASAD—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), s. 20—Mortgage—Co-mortgagors—Payment by one co-mortgagor, whether extends limitation against all.

Each co-mortgagor is liable for the entire debt secured by the mortgage and, therefore, a payment by one of the mortgagors which falls within the provisions of s. 20 of the Limitation Act operates to extend the period of limitation against all of them. [p. 424, col. 2.]

Second appeal against a decree of the Additional Subordinate Judge, Saharanpur, dated the 9th October, 1923.

Mr. *M. A. Aziz*, for the Appellants.

Mr. *Haribans Sahai*, for the Respondent.

JUDGMENT.—The plaintiff in this suit claims to recover a certain amount of money due on a mortgage-deed executed by one Ashraf Ali, and the question we have to decide is whether this suit is or is not within time. There is on the back of the mortgage-deed an endorsement purporting to have been made by Ibrahim son of Ashraf Ali, which, if it is genuine, would appear to bring the suit within time. The Court of first instance found that the endorsement was suspicious and dismissed the suit but this finding was reversed by the lower Appellate Court. Although, in our opinion, the judgment of the lower Appellate Court is somewhat cursory, we feel unable to reverse what is, in our opinion, a finding upon facts, namely, that the endorsement was made by Ibrahim.

The second point argued before us is that even granting that the endorsement is genuine it can only be held to bind Ibrahim himself who paid the sum of Rs. 40 towards interest due on the bond and not his sister *Musammat* Siddiqan who along with him is the heir of their father Ashraf Ali. We have been referred by the appellants to two rulings one of a Single Judge of the Calcutta High Court. *Arjun Ram Pal* v. *Rahima Banu* (1) and the other of a Bench of the Patna High Court, *Sarab Naraindas* v. *Top Ojha* (2). The gist of these rulings is that a payment by one debtor does not save limitation against the others. We do not know whether this is still the view of the Patna High Court, but we are satisfied that it is no more the view of the Calcutta High Court. In a ruling reported as *Saroda Charan Chuckerbutty* v. *Durga Ram De Sinha* (3) we find that it is laid down that there is nothing in s. 20 of the Limitation Act to warrant the belief that the extended period of limitation is intended to operate only against the person making the payment; and again in the most recent ruling of the same Court reported as *Achola Sundari Debi* v. *Doman Sundari Debi* (4) it was held that under the law every mortgagor is liable for the entire debt secured by the mortgage, so payment by one of the mortgagors comes within s. 20 of the Limitation Act. There is no ruling of the Allahabad High Court which is directly in point but we may refer to the judgment of a Bench in

(1) 14 Ind. Cas. 128.
(2) 43 Ind. Cas. 351; (1917) Pat. 348; 4 P. L. W. 85.
(3) 5 Ind. Cas. 484; 37 C. 461; 11 C. L. J. 484; 14 C. W. N. 741.
(4) 90 Ind. Cas. 774; A. I. R. 1926 Cal. 150.

the case of *Roshan Lal* v. *Kanhaiya Lal* (5) which clearly indicates that a payment by one person can bind others so far as to extend limitation. We would also refer to certain observations made by Lord Hobhouse [*Lewin* v. *Wilson* (6)] which have been quoted in that judgment. His Lordship's words show that this matter must be regarded from both sides, that of the mortgagee and that of the mortgagor, where he says, "As regards the recipient, so long as he is paid according to the intention of the contracting parties, he is in full enjoyment of his bargain, and is not put upon any further assertion of his rights." When the mortgagee was paid the sum of Rs. 40 by the son of the mortgagor he was bound to accept this as a payment and to assume that it would save limitation.

Mr. Aziz in reply has argued that this case should be distinguished from all the other cases cited because the parties are Muhammadans. We are unable to accede to this view. In a case like this it is the property which is liable, and we are not concerned with the liability of the various heirs of the original mortgagor *inter se*. After all the principle has been laid down by the Madras High Court in a ruling reported as *Velayudam Pillai* v. *Vaithyalingam Pillai* (7) as follows:—"The s. 20 of the Limitation Act requires that the payer should be one liable to pay the debt and provides that the result of the payment would be to give the creditor a fresh period of limitation from the date of the payment. It does not restrict the benefit accruing to the creditor with respect to his debt to his remedy against the payer alone. According to the language of the section, the debt being kept alive, the result must be to make it enforceable against any one liable for it."

In our opinion this appeal must fail, and we dismiss it with costs including in this Court fees on the higher scale.

Z. K. *Appeal dismissed.*

(5) 47 Ind. Cas. 845; 41 A. 111; 16 A. L. J. 790.
(6) (1886) 11 A. C. 639; 55 L. J. P. C. 75; 55 L. T. 410.
(7) 17 Ind. Cas. 619; 12 M. L. T. 610; 24 M. L. J. 66.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 193 OF 1923

AND

CIVIL REVISION PETITION No. 464 OF 1923.

November 20, 1925.

Present:—Mr. Justice Wallace and Mr. Justice Madhavan Nair.

S. LOGASIGAMANI MUDALIAR AND OTHERS—PETITIONERS—APPELLANTS

versus

LA. R. K. THEOGARAYA CHETTI—RESPONDENT.

C. P. C. (Act V of 1908), ss. 92, 115—Scheme decree—Application for removal of trustee—Consideration of evidence relating to breach of trust from erroneous standpoint—Order refusing to dismiss trustee—Appeal—Revision.

Under a scheme framed in a suit under s. 92, an application was made to the District Court for removal of the trustee alleging various acts of misconduct and breach of trust. The Court erroneously thought that the application was not a *bona fide* one and the whole evidence relating to the entire administration of the trust was considered from erroneous standpoints and in considering the evidence as to several breaches of trust the Court misdirected itself and refused to remove the trustee:

Held, (1) that no appeal lay to the High Court against the order; [p. 425, col. 2]

(2) that the High Court was entitled to interfere in revision under s. 115, C. P. C. and to direct a fresh disposal of the application. [p. 426, col. 1.]

Appeal against order and the civil revision petition under s. 115 of Act V of 1908, and 107 of the Government of India Act, preferred against the order dated 22nd November, 1922, of the District Court, Chingleput, in O. P. No. 63 of 1919.

Mr. *T. R. Ramachandra Ayyar*, for the Appellants.

Mr. *O. Thanikachallam Chettiar*, for the Respondent.

JUDGMENT.—The petitioners in O. P. No. 63 of 1919 before the District Judge of Chingleput, who are worshippers of the temple of Sri Theagarajaswami, Tiruvattyur, have filed a civil miscellaneous appeal under ss. 47 and 96 of the C. P. C. and alternatively a civil revision petition under s. 115 of the Code against the order of the learned District Judge refusing to dismiss from his office the respondent, the trustee of the temple. It is conceded by Mr. Ramachandra Iyer on behalf of the petitioners that no appeal lies; but he presses before us the civil revision petition on the ground that irregularities which would vitiate his order have been committed by the learned District Judge in the exercise of his jurisdiction. As there is no appeal, it is clear that we are precluded from dealing with the order on

its merits; and unless the learned District Judge has, in disposing of the petition, misdirected himself in a manner which will show that his order cannot be accepted as satisfactory, we will not be right in interfering with it under s. 115 of the C. P. C.

This temple at Tiruvattiyur is a well-known one and possesses considerable moveable and immoveable properties. In O. S. No. 2 of 1908 on the file of the District Court by certain worshippers, a scheme was framed for its management which was confirmed in appeal with certain modifications by the High Court in A. S. Nos. 204 and 205 of 1910. The respondent was a minor at that time and was represented by his mother. He is said to have assumed charge of his office as trustee in November 1912. In 1915 the then District Judge dismissed an application filed for his removal under cl. (9) (*a*) of the scheme with the remark that "in the future he (the trustee) is expected to manage the trust property more prudently than in the past and that as trustee he has not merely rights but also duties." The present application has been filed by the worshippers for the same relief.

On behalf of the petitioners Mr. Ramachandra Iyer argues that the order of the learned District Judge in the present case should not be accepted as a satisfactory one mainly on the following grounds (1) That the learned District Judge being of opinion, which according to him is erroneous, that the petition is not a *bona fide* one intended to benefit the temple and its worshippers, has not dealt with the case from a proper standpoint, and so the conclusion is unsatisfactory, (2) that with regard to the first charge, *viz.*, conversion to his own use of the income from the temple properties, (*a*) he has omitted to consider some evidence relating to it, stating that there is "absolutely no evidence to support it" and (*b*) that the true significance of some parts of the evidence relating to this charge has not been perceived by the learned District Judge: and (3) that in dealing with the trustee's failure to make certain collections which have lapsed owing to his neglect, the learned District Judge excuses the trustee as regards a portion of the amount on a ground for which there is no evidence. We will now proceed to deal with these grounds.

Ground No. (1).—In our opinion this ground of attack is well-founded. The learned District Judge prefaces his examination of the evidence with this remark in para. 6: "In considering this petition I have to consider how far it is a *bona fide* petition intended to benefit the temple and its worshippers and how far it is only a personal grudge of the petitioner." A perusal of that paragraph shows that the learned District Judge is clearly of opinion that the petition is not a *bona fide* one. Starting with this view, he considers the entire case and says in para. 17, "My conclusion is that the trustee has been incessantly harassed by the petitioner and the acts of omission are mainly due to this." It seems to us that the learned Judge's conclusions as regards the administration of the trust by the respondent given in this paragraph afford a complete refutation of his view that the petition is not a *bona fide* one. He states in the same paragraph that the trustee "must set his house in order; more particularly leases of the gardens should be offered by auction. Proper accounts should be kept for lamps and their cost; arrears of rent should be collected as far as possible and the richer defaulters sued; the second key to be given to the Gurukkal and not to the Nambudri though this may cause inconvenience; there must be no handing over of grain in bulk to the cook unless it is first entered in the accounts and a clear statement of its expenditure recorded; wages of servants must not be allowed to get into arrears and if in arrears must be clearly shown against each; to have the inventory prepared at once." And these observations come after a clear warning given to the trustee in the prior application to which we have already referred. Having regard to the conclusion arrived at by the learned Judge we cannot say that the petition is not one intended to benefit the temple and its worshippers. As the entire evidence relating to the administration of the trust has been adjudged from this erroneous standpoint, we cannot accept the final conclusion of the learned Judge as satisfactory.

Ground No 2 (a).—One of the allegations with regard to the first charge, *viz.*, conversion to his own use of the temple income is that certain grain was received from Kattalaikars for daily *pujas*; that this was received by the trustee with a large measure and distributed for temple use with a small measure and that

the difference was a profit to the trustee. The learned District Judge says with reference to this charge, "This is made with absolutely no evidence to support it, and the witnesses who speak on the point deny any such set of double measure. What mentality can a man have who makes such lying accusations with reference to the trustee of a temple?" We find from the evidence that the learned District Judge is not justified in saying that there is absolutely no evidence to support the allegation. At page 17 of the printed papers in the cross-examination of P. W. No. 3 we find the following statement: "I get 3/4th measure of unboiled rice from the Nitya-kattalai and I get Rs. 4½. Every donor gives rice with the big measures and the temple expenses are measured with a small measure. I know the rice received from the Ubhayakar and I know how much is used. So I say there is that saving." In view of this evidence the observations of the learned Judge as regards this point of the case are uncalled for.

Ground No. 2 (b).—The evidence shown as the learned District Judge points out "when grain was paid in arrears it was given raw to the servants instead of being first cooked and presented to the deity." The learned Judge while pointing out "No doubt, this is wrong for the gift is to the god" says "yet in practice it is the servants who benefit and so it was but one step further to think they could have it without its being cooked." It may be, we do not express any opinion, as the learned Judge says that from this it is not proper to presume that the trustee was taking rice for his own use; still it must not be forgotten that from a devotee's stand-point it has this significance that no *puja* is performed with the rice so offered by the Kattalaikars. This aspect of the evidence has apparently been lost sight of by the learned District Judge.

Ground No. 3.—In para. 11 of his judgment the learned Judge says "Rs. 900 is said to have lapsed owing to neglect. It is not so. Rupees 400 was attached by the Taluk Board and the balance was deposited in the Post Office under orders of this Court." Mr. Ramachandra Iyer points out that there is no evidence to support the learned Judge's statement that Rs. 400 was attached by the Taluk Board. We have not been shown any evidence justifying this statement by the learned Counsel for the respondent; but he informs us that the records of the Court available to the District Judge show that Rs. 400 was attached by the Taluk Board. This may be true but absence of any reference to such records gives a justifiable handle to the attacks of the petitioner and renders it impossible for us to verify the statement.

In our opinion, the learned District Judge has misdirected himself in the various ways pointed out above which makes it difficult for us to accept his conclusion as a satisfactory one. We must, therefore, set aside the order of the lower Court and ask the learned District Judge to hear the petition a fresh and dispose of it according to law.

In meeting the case put forward by the petitioners Mr. Thanickachallam, the learned Counsel for the respondent, has brought to our notice that subsequent to the passing of the order the trustee "has set the house in order" to use the expression of the learned Judge as regards the weak points in his administration. If this is so, the learned Judge should pay attention to this improved conduct of the trustee in considering the petition on its merits.

The appeal is dismissed and the revision petition is remanded to the lower Court for fresh disposal. We make no order as to costs in the appeal. In the civil revision petition the costs will be costs in the cause.

V. N. V. *Appeal dismissed.*

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

June 29, 1926.

Present:—Lord Phillimore, Lord Carson, Mr. Ameer Ali and Sir John Wallis.

BHUJENDRA MOHAN SARKAR—APPELLANT

versus

SUKDEB RATHI, SINCE DECEASED, AND OTHERS—RESPONDENTS.

Privy Council—Practice—Concurrent findings of fact, re-opening of.

Where there are concurrent findings of fact it is only in very exceptional cases that the Privy Council will allow the matter to be re-opened.

The rule of the Privy Council as to concurrent findings, while not being a rule applicable only to Indian cases, is specially applicable to India where so much depends on a knowledge of the native customs and language.

Appeal from a decree of the High Court at Calcutta, dated the 14th April, 1921.

Messrs. *De Gruyther, K. C.*, and *De Mello*, for the Appellant.

Mr. *W. Wallach*, for the Respondents.

JUDGMENT.

Lord Phillimore.—Their Lordships need not trouble Counsel for the respondents, and they have not asked Counsel for the appellant to argue the further points in the case, because, having heard him fully on the matter, which in their Lordships' view is on the threshold of the appeal, they have come to the conclusion that they cannot advise His Majesty to disturb the decision of the Court below. The rule of their Lordships' Board as to concurrent findings of fact, while not being a rule applicable only to Indian cases, has been more than once stated nevertheless to be specially applicable to India, where so much depends on a knowledge of native customs and language. This being so in this case there are concurrent findings of fact. There is a good deal which could be observed against those findings if they had been by one, not by two Courts. If the two Courts had disagreed there would have been much on which their Lordships would have been glad to hear further discussion, but when there are concurrent findings of fact it is only in very exceptional cases that their Lordships think it their duty to allow the matter to be re-opened. After having heard all that could be urged (and with much force) on behalf of the appellant, their Lordships are of opinion that there are here concurrent findings of fact which there was ample evidence to support, and in this case they must humbly advise His Majesty that this appeal be dismissed with costs.

A. N. A. *Appeal dismissed.*

Solicitors for the Appellant:—Messrs. *W. W. Box & Co.*

Solicitors for the Respondents:—Mr. *H. S. L. Polak.*

CALCUTTA HIGH COURT.

APPEALS FROM ORIGINAL ORDERS NOS. 260 AND 264 OF 1923.

June 9, 1926.

Present:—Mr. Justice Cuming and Mr. Justice Page.

Raja PROMODE NATH ROY AND OTHERS—DECREE-HOLDERS—APPELLANTS

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—RESPONDENT.

C. P. C. (Act V of 1908), s. 2 (12)—C. P. C. (Act XIV of 1882), s. 211—Mesne profits—Construction of decree—Mesne profits from date of suit, liability to pay—Calculation of mesne profits, principles relating to—Rental basis, whether proper—Actual receipts, liability of trespasser for—Joint trespassers, liability for mesne profits, whether can be apportioned among—Joint and several liability of tort-feasors—Receipts burden of proof.

In a suit for recovery of possession of land and mesne profits, the plaintiffs valued mesne profits till the institution of the suit and prayed that a decree may be given 'for the mesne profits claimed' with interest till date of realisation. The suit was decreed with costs and mesne profits and interest. The Executing Court held that mesne profits had been decreed only up to the institution of the suit, and that they should be calculated on a rental basis and the liability for mesne profits was also apportioned amongst the various defendants. On appeal by the decree-holders:

Held, (1) that the reasonable construction to be put upon the decree read with the plaint was that mesne profits up to the date of delivery of possession and not merely up to the date of suit was decreed; [p. 430, col. 1.]

(2) that mesne profits must be assessed according to the express provisions of the Code with reference to what the wrong-doers might or might not have realised and not with reference to what the rightful owner was receiving before eviction; [p. 431, col. 2.]

(3) that every wrong-doer being liable for the whole damage whether the wrong-doers act as between themselves as equal or one as agent of the other, each trespasser was liable jointly with his lessees for the entire amount of mesne profits and not merely to the extent of the rents realised by him. [p. 435, col. 2.]

Per *Cuming, J.*—Where some of the land trespassed upon is let out at a produce rent, a Court, in fixing the amount of mesne profits, is entitled to assume that all the land was let out at a produce rent and it is for the trespasser to show that it was not. [p. 432, col. 1.]

Per *Page, J.*—From the mere fact that in a suit for mesne profits the plaintiff has valued the mesne profits till the date of the suit, it is not reasonable to presume that the plaintiff did so because he sought only to recover such prior mesne profits. [p. 434, col. 1.]

The sum which represents mesne profits is invariable and indivisible and is payable *in solidum* by each and every person who is in wrongful possession of the property. [p. 436, col. 1.]

Although mesne profits are actually measured by the profits of the wrong-doer in actual occupation and he is the person from whom *prima facie* mesne profits are to be recovered, yet if some other person has so

conducted himself in connection with the wrongful possession of the person in actual occupation that he is regarded in law as being jointly in possession with the person in actual occupation, such other person is jointly and severally liable with the person in actual occupation for the whole of the mesne profits which have accrued. [p. 436, col. 1.]

Appeals against the orders of the Subordinate Judge at Krishnagar, District Nadia, dated the 13th and 20th of March, 1923, respectively.

IN APPEAL No. 260 OF 1923.

Dr. *S. C. Basak*, Babus *Rupendra Kumar Mitter* and *Dharmadas Set* (for Babu *Pasupati Ghose*), for the Appellants.

Babus *Dwarka Nath Chakraverti*, *Surendra Nath Guha*, Mr. *Gunoda Charan Sen* and Babus *Bhupendra K. Ghose*, *Trailokhya Nath Ghosh* and *Promode Kumar Ghosh*, for the Respondents.

IN APPEAL No. 264 OF 1923.

Mr. *Ram Ch. Majumdar* and Babu *Peary Mohan Chatterjee*, for the Appellants.

Babus *Dwarka Nath Chakraverti*, *Surendra Nath Guha*, Babus *Dwarka Nath Chakraverti*, Mr. *Gunoda Ch. Sen*, Babus *Trailakhya Nath Ghosh*, *Prosanta Bhusan Gupta* and *Promode Kumar Ghosh*, for the Respondent.

JUDGMENT.

Cuming, J.—These two appeals arise out of certain execution proceedings.

It would appear that so long ago as 1904 two suits were brought by the two decree-holders Kumar Basanta Kumar Roy and Bibi Jaroa Kumari Saheba for recovery of *khas* possession of their respective 5-annas share in certain *char* lands.

The suits were brought against the Secretary of State for India in Council, Srish Chandra Sanyal and a number of other persons among whom may be noted the parties who may be described as the Kundu defendants. With regard to the suit of Kumar Basanta Kumar Roy the suit was decreed with costs and mesne profits against the principal defendants and the defendants added which included defendants Nos. 1—15 and 18. A similar decree was passed in the suit of Bibi Jaroa Kumari against the same defendants. Both suits were fought up to the Privy Council with varying success in the different Courts. The decision of the Privy Council was in favour of the plaintiffs in both suits.

In these execution proceedings the main points contested were the period for which mesne profits had been decreed by the trial Court, the basis on which the mesne profits were to be assessed and who was liable to pay those mesne profits. The Executing Court held that mesne profits had been decreed only up to the date of the institution of the suit and not up to the date of delivery of possession as contended by the decree-holder. With regard to the basis on which the mesne profits were to be assessed the Executing Court held that the correct basis was the rental basis. The Court also apportioned the liability among the different defendants. The decree-holders have appealed in both the cases and on appeal have challenged the findings of the Executing Court on all the points I have mentioned. The first point to be determined is for what period the decree-holder is entitled to mesne profits.

The decree states no period. It states that the suit is decreed with costs and mesne profits. The respondent contends that all that the decree-holder asked for was mesne profits up to the date of the suit and that from that fact it is clear that in using the expression mesne profits the Court clearly intended mesne profits only up to the date of suit. He contends that the Court cannot be held to have given the decree-holder a relief which he never asked for.

The point for our decision is the correct construction of the decrees.

The sheet anchor of the decree-holder's case is the decision of the Privy Council in the case of *Fakharuddin Mohammad Ahsan* v. *Official Trustee of Bengal* (1). In that case the terms of the decree were that the plaintiff be declared entitled to possession with *wasilat* from the commencement of Sraban. Their Lordships, in considering the plaint, held that it was at all events open to the construction that the plaintiff did intend to claim *wasilat* up to the time of delivery of possession, although for the purpose of valuation of the suit only so much was valued as was then due. They pointed out that under the law *wasilat* could be given up to the date of possession and concluded their judgment by saying that it appeared to their Lordships that the more reasonable construction of the document is that the Court intended to give with possession that *wasilat* which was claimable up to the time of possession.

(1) 8 I. A. 197; 8 C. 178; 4 Shome L. R. 202; 10 C. L. R. 176; 4 Sar. P. C. J. 270; 4 Ind. Dec. (N. s) 114 (P. C.).

Finally, their Lordships referred to a number of cases and pointed out that this was not a case in which the decree was silent on the subject of *wasilat* but that it expressly mentioned *wasilat* and that the expression *wasilat* with possession might reasonably be held to have the construction put upon it by the High Court, *viz.*, *wasilat* up to the time of delivery of possession. Now, I do not propose for one moment to attempt to construe the present decree by the decree in the suit which was being dealt with by the Privy Council, but in construing the present decree I propose to apply the same principles which their Lordships applied in construing the decree before them. It is clear from the judgment I have just referred to that a Court construing the decree may look at the term of the plaint itself.

Now in the decree the Court has set out the major portion of the plaint. In the plaint the plaintiff in Appeal No. 260 claimed Rs. 7,545 made up as follows:—Rs. 6,159-9 0, the value of the land and Rs. 1,231-5-9, the mesne profits for three years and finally asked for possession and mesne profits claimed. The respondent argues that clearly the plaintiff made definite prayer, therefor, for the mesne profits claimed, *viz.*, Rs. 1,231-5-9 and, therefore, by implication he claimed these mesne profits and these only and intended to get the remainder by a separate suit.

The appellants contend that the expression mesne profits claimed means the mesne profits claimed in the heading to the suit where the suit is described as a suit for recovery of immoveable property and mesne profits, and that the value of mesne profits up to the date of suit had to be given for the purpose of valuation of his suit.

After a careful consideration of the decrees I hold that the reasonable construction to be put on them is that the value of the mesne profits was given up to the date of suit for the purposes of valuation and that what the Judge intended to give and has given in his decree were mesne profits up to the date of delivery of possession.

As far as can be seen this was the interpretation that was put on the decrees by the parties themselves up to the execution proceedings. The Kundus themselves in their objections to execution contended that all that the decree-holders are entitled to get is mesne profits from 5th December, 1903, to 13th February, 1918. No doubt, this would not prevent the judgment-debtor from contending that they had misunderstood the decree. In para. 9 of the plaint in which the value of the mesne profits is given as Rs. 1,389, it is, I think, clear that the amount was stated for the purposes of assessing stamp duty. That is, I think, evident from the fact that the paragraph goes on to state: "so the plantiffs bring their suit on paying the proper Court-fees on a valuation of Rs. 7,545-11-8, being the total of the aforesaid two sums."

The judgment-debtors have laid much stress on sub-cl. (*b*). The words used in the clause are—"A decree may be given for the mesne profits claimed with interest till date of realisation." The judgment-debtors strenuously contend that the expression mesne profits claimed can only refer to the mesne profits of which the valuation has already been set out in para. 9.

I do not think that it is necessary to give this meaning to the expression mesne profits claimed. The plaintiffs described their suit as one for mesne profits and the expression mesne profits claimed, I think, may reasonably be considered to refer to the general claim for mesne profits and not only to the mesne profits up to the date of suit, the value of which it was necessary to state for the purposes of assessing the stamp duty. I am, therefore, of opinion that the decree-holders in these two appeals are entitled to mesne profits down to the date of delivery of possession.

The next question to be considered is what is the basis on which the mesne profits are to be assessed. The Executing Court has allowed mesne profits on what is called a rental basis, that is to say, the amount of profits which would have been received by the decree-holders if he had been in possession and had let out the land at a money rental to *raiyats*. The decree-holders contend that the Court should have gone into the nature of possession of the land exercised by the judgment-debtor. They contend that the judgment-debtors were in *khas* possession of some of the lands and that some of the other lands they let out to *bhag* tenants, in which case they received half the produce of the land. They contend that the defendant Srish Chandra Sanyal was on his own admission in actual possession by actually cultivat-

ing the land himself or through *bhag* tenants.

The Kundu defendants who alone are really contesting these appeals contend that they let out the land in *putni* to Srish and that all that they are liable for is the amount of rent that they obtained from Srish as sub-lessee under them. They contend that the decree-holder being a *zemindar* would have let out the land in *putni*. Now mesne profits is defined in the Code as those profits which the persons in wrongful possession of such property actually received or might with ordinary diligence have received therefrom together with interest on such profit, but shall not include profits due to improvement made by the person in wrongful possession. Now in this case the persons or rather persons in wrongful possession were mainly the Kundus and Srish.

The principle which the learned Judge has followed in his judgment is this. If the person kept out of possession is a cultivating *raiyat* he would be entitled to mesne profits on a produce basis, that is to say, the net value of the produce received after he has paid the necessary costs of cultivation, etc., but that if he happens to be a tenure-holder, that is, a rent-receiver from the *raiyats* on the land he should get the mesne grofits on a rent basis, *viz.*, the amount he would have received by way of rent from the *raiyats*.

In support of this contention he has cited a number of rulings. It perhaps is not easy to deduce any general principle from these decisions. They really each of them apply to the particular facts of the particular case they were dealing with. For instance, in the case of *Surja Pershad Narain Singh* v. *Reid* (2), it was held that where a decree-holder was in constructive possession by letting out the lands to tenants before ouster, the mesne profits should be measured by what would be a fair and reasonable rent for the land if they had been let out to tenants during the period of dispossession. At the same time the learned Judges remarked that there was no general principle which could be made applicable to every case.

They consider that the Judge in the particular case before them should have ascertained what was the nature of the possession of the decree-holder before he was dispossessed. In the case of *Biresshur Dutt Chowdhury* v. *Barode Prosad Roy* (3) the learned Judges held and with the greatest respect I consider rightly that mesne profits must be assessed according to the express provision of the Statute with reference to what the wrong-doers might or might not have realised and not with reference to what the rightful owner was receiving before eviction. Further, they held and here again I entirely agree that where more persons than one are concerned in the commission of a wrong, the wronged person has his remedy against all or any at his choice. Every wrong-doer is liable for the whole damage and it does not matter whether they acted as between themselves as equal or one as agent of the other. Therefore, a trespasser is liable jointly with his lessees for the entire amount of mesne profits and not merely to the extent of the rents realised by him. As I have already remarked each of these decisions must be considered in the light of the particular fact of the particular case. So long as we have the express word of the Statute we can hardly hold that any general principle is laid down by any of them, for we have the Statute itself to guide us and the principle to be followed is obviously the principle laid down in the Statute itself. Now, what are the facts of the present case? The land is *char* land, it had been under water for some 40 years and there is not the slightest evidence to show even if it were a factor to be taken into consideration how the plaintiff-decree-holders used the land before diluvion. We are not, I think, entitled to assume, even if it were a factor to be taken into consideration, that the *zemindar* would have let out the land in *putni* as the Kundus allege they themselves did.

The decree-holders are entitled to get the profits actually received by the person or persons in wrongful possession. If Srish let out any of the land in *bhag* or kept any of the land in his *khas* cultivation the decree-holders are entitled to get what Srish actually got.

The decree-holders state that Srish had an area of some 600 *bighas* in *khas* or *bhag* cultivation. The Commissioner finds that Srish had no land in either *khas* or *bhag* cultivation. It is difficult to see how the

(2) 29 C. 622; 6 C. W. N. 409.

(3) 11 Ind. Cas. 504; 15 C. W. N. 825.

Commissioner arrived at the conclusion in the face of Srish's own written statement in which he stated that the plaintiffs could not get *khas* possession as he, Srish, had been in possession for more than 12 years by cultivating the land himself or in partnership with tenants and by selling grass and jungle and by receipts of rents. Further we have the fact that in *pattah* granted by Srish the boundaries are some times given as the *sarkari* or *zemindar's khas* land.

No doubt, Srish in his evidence later on denied all these and gave a more or less untruthful explanation. The Commissioner seems to have accepted the statement though it is difficult to understand why Srish produces none of his papers. There is a well-known principle that everything is to be presumed against the wrong-doer.

Where on Srish's own statement and from his evidence supplied by his own *pattah* it is clear that some of the land was held on a produce rent, the Court is entitled to presume that it was all so held and the burden of proof is on the wrong-doer to show that it was otherwise.

The principle which I think is to be followed in the present case is that it having been proved that some of the land has been let out at a produce rent, the Court is entitled to assume that all the land was let out at a produce rent and it is for the tortfeasors to show that it was not. They have their papers and by the production of their papers can at once prove how they actually dealt with the land.

The case will have to go back to the Executing Court now to ascertain what is the amount of mesne profits up to the date of delivery of possession and in arriving at the amount the Court should be governed by the above principles.

With regard to the next point who are the persons liable to pay the mesne profits. That has already been decided in the decree of the trial Court.

The trial Court gave a decree with costs, interest and *wasilat* against the principal and added defendants. The amount was left to be decided in the execution department but it is clear from the decree that all the defendants are jointly and severally liable for the whole amount of mesne profits.

The only defendants, the extent of whose liability had to be determined by the executing department, were defendants Nos. 1 and 5. The Executing Court has found that defendants Nos. 1 to 5 are liable for a certain amount in each case.

Reading, however, the judgment as a whole I think it is quite clear (see pages 155-156) that the learned Judge must have meant defendants Nos. 1 and 5. He only discusses the case of defendants Nos. 1 and 5 and as a matter of fact that was the only case open to him to discuss in view of the decree of the trial Court. If, however, he has found that defendants Nos. 1 to 5 are liable for mesne profits in one case to the extent of Rs. 645-10-0 and in the other to the extent of Rs. 564-14, he is obviously wrong. The decrees were against all the defendants.

Only the liability of defendants Nos. 1 and 5 had to be separately assessed.

So far as all the other defendants are concerned the decree makes them all jointly and severally liable for the whole amount.

One other small matter remains to be decided. The representatives-in-interest of Jaroa Kumari who has died and whose interest has devolved on a number of persons ask the Court that the Executing Court should apportion the mesne profits among the five decree-holders. Obviously this is not a question that can be determined in the present proceedings.

The appeals must succeed and be decreed and the case go back to the Executing Court to determine the amount of mesne profits payable by the defendants bearing in mind the direction given above.

As it is clear from the learned Judge's judgment whether he correctly assessed the liabilities of defendants Nos. 1 and 5, this point should also be determined by the Executing Court. The appellants are entitled to their costs from the Kundu defendants who have contested these appeals. We allow 20 gold *mohurs* in each appeal.

The cross objections not being pressed are dismissed, but without costs.

Page, J.—These are appeals from two orders passed by the Subordinate Judge for Nadia in Execution Cases Nos. 43 and 63 of 1923.

The suits in the course of which the appeals have been preferred were brought to recover *khas* possession and the mesne profits of certain *char* lands. The *char* appeared for the first time about 1888, and from 1899 until 1903 was regarded as an accretion to *char* Raninguggar No. 1, a

Government *mahal*. On the 5th December, 1903, the Government released the lands in suit to the Kundu defendants Nos. 6 to 15 and 18, and now respondent-judgment-debtor. While these lands are regarded as Government property a temporary lease of some of the lands was granted to defendant-judgment debtor No. 5, and also to defendant-judgment-debtor No. 2. Immediately after the release of the lands to the Kundu defendants, they granted a settlement of 16 annas thereof to the defendant No. 2, who remained in actual occupation of the same from that time until possession was delivered to the decree-holders on 13th February, 1919. The Kundu defendants admittedly are entitled to a six-annas share of the said lands, and the decree-holders in each of the two suits are entitled to a five-annas share respectively. During the hearing of the appeals before us a number of issues were raised and exhaustively argued; but as this tedious and protracted litigation has been dragging its way through the Courts for twenty years, and now at length has reached the stage of execution, we think that the time has arrived when the case should be treated on broad lines and finally determined. Accordingly, the learned Senior Government Pleader who appeared both for the Secretary of State for India and also for the Kundu defendants—the other judgment-debtors not appearing on the appeal—stated that he withdrew his cross-objection to the orders under appeal; and the learned Advocates and Pleaders who appeared for the parties agreed that the two questions which fell for determination in the appeal were:—

1. What is the true construction of the decrees in execution of which the orders under appeal were passed?

2. Upon what principle are the mesne profits decreed to be ascertained? Now, the form of the decree in each of the suits is substantially the same, the material portion of the decree in suit No. 5 of 1905 being—

"It is ordered and decreed that the claim in this suit with interest and mesne profits be decreed with costs against the principal defendants and those who have been made defendants afterwards; that the plaintiffs' title to a five-annas share of the property under claim be declared: and that the plaintiffs do get joint *khas* possession in the said share with their co-sharers, and that the amount of mesne profits be ascertained in execution of the decree."

The material portion of the decree in suit No. 425 of 1904 was that—

"It is ordered that the claim of this suit be decreed with costs and mesne profits and interest against the principal defendants and the defendant subsequently added. The plaintiffs be declared entitled to a five-annas share of the disputed property and they do get *khas* possession of the same, the amount of mesne profits to be ascertained in execution."

It is common ground that under these decrees the plaintiffs are entitled to mesne profits for a period of three years prior to the date when the suits respectively were instituted. The respondents, however, contend, and the learned Subordinate Judge has held, that the plaintiffs are not entitled to mesne profits *pendente lite* or thereafter until the defendants gave up possession of the land, inasmuch as such additional mesne profits were neither claimed in the plaint nor expressly decreed by the Court. I am of opinion that there is no substance in this contention, and that the plaintiffs-appellants are entitled under the decrees to mesne profits until delivery of possession. This appears to be clear from the form of the decrees. *Ex concessis* part of the plaintiffs' claim was for mesne profits up till the date when the suit was instituted, and since the claim in each suit was decreed with mesne profits it follows that the mesne profits which were decreed in addition to the claim must be mesne profits other than and in addition to the mesne profits up till the date of the suit which formed part of the claim. But it is urged that as the plaintiffs did not claim to recover future mesne profits in their plaint the Court could not have intended to award them some relief for which they did not pray. I do not think, however, that the plaintiffs limited their claim in the plaint to such mesne profits only as accrued prior to the institution of the suit. At the commencement of the plaint in Suit No. 425 of 1904, it is stated to be a "Suit for declaration of title to and for recovery of possession of immoveable property and mesne profits valued at Rs. 7,545-14-8, increased by order of Court, dated 7th June, 1906." A similar statement appears at the commencement of Suit No. 5 of 1905. No doubt in para. 9 of the plaint in each suit the mesne profits up till the date of suit are valued at a

specified sum; but that was done because it was incumbent upon the plaintiffs to value the mesne profits then due for the purpose of the assessment of Court-fees, and it is not reasonable to presume that they did so because they sought only to recover such prior mesne profits in the suit. Further, in each suit the plaintiffs prayed for any other relief to which the Court might think them entitled, and that prayer would cover mesne profits subsequently accruing, for in respect of such mesne profits there is no cause of action at the time of the commencement of the suit, and it is only by means of statutory provisions framed with the obvious purpose of shortening litigation that they can be awarded in the suit; *Bhupendra Kumar Chakravarti* v. *Purna Chandra Bose* (4), C. P. C., 1882, s. 211. The construction which we put upon the decrees in these suits is that which found favour with the Judicial Committee of the Privy Council in *Fakharuddin Mahomed Ahsan* v. *Official Trustee of Bengal* (1). Their Lordships after expressing the opinion that the plaint in that case was "at all events open to the construction that the plaintiff intended to claim *wasilat* up to the time of delivery of possession, although, for the purpose of valuation only, so much was valued as was then due," added that "be that as it may.....*Wasilat*, by law, is demandable up to the time of possession, and the question is, whether the Court intended to give to the plaintiff that amount of *wasilat* to which he was undoubtedly entitled by law in this action, or whether they intended to cut his claim for *wasilat* into two, and to give him in this suit so much only as accrued up to the time of the commencement of the suit, and to leave him to bring a separate suit for the rest." It appears to their Lordships that the more reasonable construction of this document—which undoubtedly might have been clearer—is that the Court with a view to carrying out the object of the Legislature, namely, the prevention of unnecessary litigation and multiplication of suits, intended in this suit to give with possession that *wasilat* which was by law claimable up to the time of possession. The view which their Lordships take of the decree is much confirmed by two cases of *Dhurm Narain Singh* v. *Bundhoo Ram* (5) and *Bunsee Singh* v. *Mirza Nazuf Ali Beg* (6), to which their attention has been called, wherein it would appear that the High Courts have, dealing with words identical or extremely similar, given them the interpretation that possesssion with *wasilat* means *wasilat* up to the time of possession being delivered. Their Lordships cannot but fear that, if they were to hold the contrary, they would throw doubt upon many cases which have been decided and acted upon in India.

Their Lordships do not feel at all pressed by the authority of several cases to which their attention has been called, the doctrine of which has been confirmed by this Board, namely, that where a decree is silent on the subject of interest or *wasilat*, interest or *wasilat* cannot be added in the course of execution. But here the decree is not silent on the subject of *wasilat*. On the contrary, it is expressly mentioned; and the term 'possession with *wasilat*' appears to them reasonably to bear the construction which has been put upon it by High Court not only in this but in many other cases. For these reasons, I am of opinion that under the decrees in the present suits the plaintiffs are entitled to mesne profits not only for three years prior to the institution of the suits respectively, but also *pendente lite* and until the 13th February, 1919, when they obtained delivery of possession. Moreover, it is to be borne in mind that, although no ground of appeal based upon estoppel is set forth in the memorandum of appeal, and no oral evidence was adduced to prove that the plaintiffs had altered their position by reason of the reliance which they had placed upon any representation by the defendants to the effect that they admitted that under the decree the plaintiffs were entitled to future mesne profits, nevertheless for twenty years the litigation proceeded upon that assumption and as late as 1919 the Kundu defendants in their petition of objection filed in the present execution proceedings admitted that the plaintiffs were entitled to recover future mesne profits, although they disputed the plaintiffs' estimate of what those mesne profits were. In these circumstances if it was incumbent upon the Court at this late stage in the litigation to hold that the plaintiffs were not entitled to future mesne profits, the

(4) 8 Ind. Cas. 34;43 C. 650 at p. 655; 15 C. W. N. 503; 13 C. L. J. 132.

(5) 12 W. R. 75.

(6) 22 W. R. 328.

result, to adopt the language used by Sir James Colville in *Sadasiva Pillai* v. *Ramalinga Pillai* (7), would be "discreditable to the administration of justice." In my opinion, however, there would be no justification for placing upon the decrees the construction which the respondents have pressed upon us. I am further of opinion that under the decrees the judgment-debtors are jointly and severally liable for the mesne profits which have accrued during the period for which the mesne profits are recoverable, or for such part thereof as accrued during that portion of the period in which each of them respectively has been in possession of the lands in suit.

The second question now arises for consideration, namely, upon what basis are such mesne profits to be ascertained? In this connection the respondents have relied upon two main contentions (1) that the plaintiffs are entitled to recover from the defendants only such profits as the plaintiffs using reasonable diligence could have made if they had been in possession of the lands, and inasmuch as the plaintiffs are either *zemindars* or *putnidars* and would not themselves have worked as cultivators of the land, they are only entitled to recover mesne profits upon a rental basis; (2) that each of the judgment-debtors is liable only for the portion of the mesne profits that he actually received or with reasonable diligence might have received during the period in which he was in wrongful possession; that is to say, the person in actual possession is liable only for the net profit which he received after deducting working expenses, and the rent that he paid to his landlord, while the landlord is liable only for the rents which he received less the cost of collection. Many authorities, both Indian and English, have been cited to us upon this subject some of which admittedly are conflicting, while in others it is not always easy to discover the *ratio decidendi* upon which the decisions proceeded. If I refrain from discussing these authorities in detail I do not do so because I have failed to appreciate the skill and care with which the arguments on behalf of the parties have been presented to us, or, indeed, because to do so might be to make "confusion worse confounded" but because the basis of assessment is laid down in s. 211 of the C. P. C., 1882, which runs as follows :—

"'Mesne profits' of property mean those profits which the person in wrongful possession of such property actually received, or might, with ordinary diligence, have received therefrom, together with interest on such profits."

Now, this definition of mesne profits clearly is fatal to the first contention urged on behalf of the respondents, for the basis of assessment prescribed is not what the plaintiff might have made out of the land if he had been in possession, but the profit that the person in wrongful possession actually received, or with ordinary diligence might have received out of it. No doubt, in certain cases the profit which the plaintiff had made in the past while in possession of the land may be evidence of value in estimating the profits which the wrong-doer while in possession ought to have made, but the basis of assessment in all cases remains the same, namely, that provided in the statutory definition.

Now, what is the foundation in law of a cause of action for mesne profits? It has been stated to be in *consimili casu* with a cause of action for trespass. But mesne profits are not the sole or the normal form in which damages are awarded for trespass to land. One person may trespass upon the land of another without depriving that other of the possession to which he is entitled; for instance, he may walk over the land, or project *missilis* thereon from without; or again, by violence or threats he may prevent the person entitled to possession from remaining on the land, although the wrong-doer himself does not take possession. In such cases, no doubt, the wrong-doer is liable to an action on the case for such damages as the Court may think it right to award, and if more persons than one combine to commit the tort, each of such persons is jointly and severally liable for the entire damages which have been sustained by the person whose legal rights have been invaded. In cases of this description the damages are at large, and the Court awards a sum which it deems to be commensurate with the injury that the plaintiff has suffered. But in such cases the wrong-doers are not liable for mesne profits, for mesne profits in the eye of the law are damages to be ascertained upon a definite basis that are recoverable against a person, because he has been in wrongful possession

(7) 2 I. A. 219; 24 W. R. 193; 15 B. L. R. 383; 3 Sar. P. C. J. 519; 3 Suth. P. C. J. 190 (P. C.).

of land of which the plaintiff is entitled to be in possession.

The foundation of the cause of action for mesne profits is the wrongful possession of the defendant, and the question to be determined in each case is the amount of the profits which the wrong-doer while in possession received, or if he had used ordinary diligence ought to have received, out of the property. The sum which represents the mesne profits, in my opinion, is invariable and indivisible, and is payable in solidum by each and every person who is in wrongful possession of the property.

But, as Lord Mansfield, C. J., asked in *Burne* v. *Richardson* (8) "must not the defendant in an action for mesne profits be the person in actual possession and trespassing?" The answer would seem to be that although mesne profits are measured by the profits of the wrong-doer in actual occupation, and he is the person from whom *prima facie* mesne profits are to be recovered, yet, if some other person has so conducted himself in connection with the wrongful possession of the person in actual occupation that he is regarded in law as being jointly in possession with the person in actual occupation, such other person is jointly and severally liable with the person in actual occupation for the whole of the mesne profits which have accrued, *Doe* v. *Harlow* (9), *Doe* v. *Challis* (10), *Powell* v. *Aiken* (11), *Campbell* v. *Loader* (12), *Biresshur Dutt Chowdhury* v. *Baroda Prosad Roy* (3), *Mudun Mohun Singh* v. *Ram Das Chuckerbutty* (13), S. A. No. 4101 of 1910, S. A. No. 465 of 1916 and *Easin Sheikh* v. *Sikandar Sheikh* (14). With respect to the doctrine propounded by Mookerjee and Teunon, JJ., in *Ram Ratan Kapali* v. *Aswini Kumar Dutt* (15), that persons who are found to be jointly in wrongful possession of the plaintiff's land and liable for mesne profits, are entitled to have the sum awarded to the plaintiff for mesne profits apportioned as between them and the plaintiff if the Court is of opinion that the joint tort-feasors remained in wrongful possession in the *bona fide* belief that they were entitled to be in possession and with a conscience void of offence, I confess, with all due respect for those learned Judges, that I can find no principle or authority in support of it; while the speeches in *Palmer* v. *Wick Steam Shipping Co.* (16), upon which their Lordships rely, and in the course of which the House of Lords had occasion to discuss the question whether there could be contribution between joint tort-feasors, appear to me to be incompatible with any such doctrine. I am of opinion, however, having regard to the facts in the present case, that neither the Kundu defendants nor defendant No. 2 can be brought within the category of persons to whom this doctrine could in any event be made applicable; and that such a doctrine, if applied in this case, would work considerable hardship upon the plaintiffs, for the Kundu defendants (who are really the contesting respondents, and who, in my opinion, have rightly been held jointly liable for mesne profits with the defendant No. 2 who was in actual possession), are men of substance, while the defendant No. 2 is wholly without means with which to liquidate the judgment-debt.

For these reasons, I agree that the appeal must be allowed, and the case sent back for re-consideration as proposed by my learned brother.

A. N. A. *Appeal allowed.*

(8) (1813) 4 Taunt. 720; 128 E. R. 513; 14 R. R. 647.
(9) (1840) 12 A. & E. 40; 113 E. R. 724; 54 R. R. 523.
(10) (1850) 18 Q. B. 224; 118 E. R. 84.
(11) (1858) 4 K. & J. 313; 70 E. R. 144; 116 R. R. 358.
(12) (1865) 3 H. & C. 520; 34 L. J. Ex. 50; 11 Jur. (N. S.) 286; 13 W. R. 348; 11 L. T. 608; 140 R. R. 589; 159 E. R. 634.
(13) 6 C. L. R. 357.
(14) 94 Ind. Cas. 118; A. I. R. 1926 Cal. 847.
(15) 6 Ind. Cas. 69; 37 C. 559; 11 C. L. J. 503; 14 C. W. N. 849.
(16) (1894) A. C. 318; 6 R. 245; 71 L. T. 163.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 211-B OF 1926.
November 22, 1926.
Present:—Mr. Hallifax, A. J. C.

SALABAT KHAN—PLAINTIFF—APPELLANT
versus
DEO RAO AND OTHERS—DEFENDANTS—RESPONDENTS.

C. P. Village Sanitation and Public Management Act (II of 1920)—Rules under the Act, r. 4 (a)—Revenue Patel—Appointment of Patel for each khel *of village, whether legal—"Working Patel", whether includes Revenue Patel—Berar Patels and Patwaris Law, 1900, s. 2—"Village", whether includes* khel.

Under the C. P. Village Sanitation and Public

Management Act as applied to Berar, a separate revenue Patel can be appointed for each *khel* or sub-division of a village.

The word "working Patel" as used in r. 4 (*a*) framed under the Act does not mean only the Police Patel but includes the Revenue Patel, who is entitled to a seat on the *Panchayat* constituted under the Act.

The expression "village" as used in the Berar Patels and Patwaris Law includes a sub-division of a village known as *khel*.

Appeal against the decree of the Additional District Judge, Amraoti, dated the 13th February, 1926, in Civil Appeal No. 260 of 1925.

Mr. *R. R. Jayavant*, R. B., for the Appellant.

JUDGMENT.—The Central Provinces Village Sanitation and Public Management Act, 1920, applies to the four villages of Anjangaon, Surji, Ewazpur and Shahapur as a group. Anjangaon is divided into eight *khels*, and there is a working Revenue Patel for each of them with one working Police Patel for all eight. Surji has two working Patels, one Revenue and one Police, and Ewazpur and Shahapur have each one working Patel only. The constitution of the committees formed under the Act is stated in Gazette Notification 1902/884 VIII of the 17th of August, 1922, and so much of r. 4 (*a*) as affects this case runs as follows: "The *panchayat* shall consist of the working Patel or Patels and of such number of elected members not less than four nor more than eight as may be fixed by the Deputy Commissioner." For this group of villages the Deputy Commissioner has fixed eight as the member of elected members of the *panchayat*.

The plaintiff, who is a rate-payer of Anjangaon, prayed in the present suit for various declarations which come practically to this, that the rules do not authorise more than one Revenue Patel of Anjangaon to be a member of the *panchayat*. No single argument worthy of a moment's consideration seems to have been evolved in support of this contention in the three years during which the case has been before the Courts, nor can I imagine one.

Two despairing suggestions were made in this Court. One was that the working Patel mentioned in the rule means only the Police Patel, because the Revenue Patel is not concerned with the matters regulated by the *panchayat*. The contention is so impossible that it was not put forward even in the plaint, where it is admitted that the Revenue Patel of Surji and one Revenue Patel for Anjangaon are entitled to seats on the Panchayat.

The other suggestion was that there could not be more than one Revenue Patel for a village, that is to say, that separate Revenue Patels cannot be appointed for the different *khels* of one village. Nothing has been said to support this contention, and to the direct contrary there is s. 2 of the Berar Patels and Patwaris Law, 1900, which says: "In this law, unless there is some thing repugnant in the subject or context, the expression 'village' means an area for which the office of Patel or *Patwari* has been constituted, and includes a group of villages and the sub-division of a village known as a *khel*." The plaint can hardly be said to disclose a cause of action, but anyhow the suit should have been dismissed in its first stages.

That is really all there is or ever was to be said about the case. But the trial in the first Court took just over twenty months involving the examination of seven witnesses for the plaintiff and eight for the defendants and the filing of thirty eight documents with reference to seven stated issues, among which it is hard to find the single one that did arise, and culminating in a judgment of thirteen type-written pages of foolscap paper. In the nine pages of discussion of the case there is practically nothing in the reasons for the conclusions on the irrelevant matters examined or in those conclusions that is sound, except the final conclusion that the suit ought to be dismissed. Even that, as was pointed out in the judgment of the lower Appellate Court, is itself based on wrong conclusions.

The appeal is dismissed without notice to the respondents. Each of the learned Judges of the lower Courts has, through reprehensible carelessness, committed the injustice of ordering that the Pleader's fee to be paid to the successful defendants is to be the rediculous sum of Rs. 3-12.

G. R. D. *Appeal dismissed.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 821 OF 1924.

August 16, 1926.

Present :—Mr. Justice Curgenven.

SANNASI CHETTI—PLAINTIFF—PETITIONER

versus

ARUNACHALA CHETTI AND ANOTHER —DEFENDANTS—RESPONDENTS.

Contribution, suit for—Decree against two judgment-debtors—Satisfaction by one judgment-debtor by execution of pro-note—Liability to contribution—Limitation, commencement of.

Where a decree against two judgment-debtors is satisfied by one of them by the execution of a pro-note in favour of the decree-holder, the judgment-debtor who satisfies the decree has no right to sue the other judgment-debtor for contribution unless he proves that he has subsequently paid off the pro-note executed by him inasmuch as the cause of action in such a suit is not merely the procuring by the plaintiff of the defendant's exoneration from liability to the creditor but also being himself damnified. The limitation in such a suit would begin to run not from the date on which the plaintiff executed the pro-note but from the date on which he paid off the pro-note and was himself damnified.

Petition, under s. 25 of Act IX of 1887, praying the High Court to revise a decree of the Court of the District Munsif, Trikoilur, in S. C. S. No. 268 of 1924.

Mr. *M. S. Venkatarama Ayyar*, for the Petitioner.

Mr. *N. C. Vijaraghavachari*, for the Respondents.

JUDGMENT.—This is a suit for contribution by one of two co-promisors under a promissory-note. The sole issue tried by the District Munsif was one of limitation. He has assumed that the payment which was made by the plaintiff under the decree in the suit brought by the holder of the note was on the 8th of March, 1921 the date on which the decree was entered as satisfied. It appears from the plaintiff's evidence that satisfaction was effected by means of a promissory-note for Rs. 50, the balance being paid in cash. The question, therefore, arises whether the execution of a promissory note is such a payment as would enable one of two creditors to sue the other for contribution. This question has been answered in the negative in *Putti Narayanamurthi Ayyar* v. *Marimuthu Pillai* (1), where a similar point came up for decision. It was pointed out that the principle of law applicable is that laid down in s. 145 of the Indian Contract Act relating to the indemnification of a surety by the principal debtor and it was added "It will be noted that the surety's right is to recover from the principal debtor whatever sum the former paid to the creditor which sum ought to have been paid by the principal debtor. The principal debtor being bound to indemnify the surety, it is obvious that the cause of action cannot be merely the procuring by the surety, of the principal debtor's exoneration from liability to the creditor but also the surety being himself damnified."

(1) 26 M. 322.

The same principle was adopted in *Pundi Duraisami Tevar* v. *Lakshmanan Chetty* (2) which was a case between vendor and vendee. The vendee failed to pay the purchase-money to a creditor of the vendor in pursuance of a covenant, so that the vendor had to execute a promissory-note for the interest due to the creditor. It was held, following *Putti Narayanamurthi Ayyar* v. *Marimuthu Pillai* (1), cited above, that this did not amount to such damage as would entitle him to sue. I think accordingly that, before the suit is dismissed on the ground of limitation, the question must be gone into as to the manner in which the decree was satisfied by the plaintiff and if satisfaction was effected partly by the execution of a promissory-note, when if at all, the debt under that note was discharged as that would give the starting point for limitation to run.

The respondent's Pleader has raised an objection to this course that the plaintiff's case was that payment was actually made at the date of satisfaction of the decree. But, so far as I understand what he says, he does not assert that that payment was made in cash. He merely means that the decree was satisfied. I accordingly remand the suit for a fresh finding upon the issue whether the suit is barred by limitation and for disposal accordingly.

Costs will abide the result.

Z. K. *Petition remanded.*

(2) 14 M. L. J. 285.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 136-B OF 1925.

October 5, 1926.

Present:—Mr. Hallifax, A. J. C., and Mr. Prideaux, A. J. C.

VITHALDAS—PLAINTIFF—APPLICANT

versus

GHULAM AHMAD AND ANOTHER—DEFENDANTS—NON-APPLICANTS.

Court Fees Act (VII of 1870), s. 7 v (e), xi (cc)—Suit

for ejectment of tenant holding over—Court-fee payable, whether on market-value or one year's rent—Tenant holding over, whether trespasser.

Although a tenant holding over is a trespasser and not a tenant of any kind after he has refused to comply with a proper notice by the landlord to quit, up to the moment he gives rise to the cause of action by refusing to quit on demand, he is still a tenant and this is the point of time to which the suit for his ejectment in consequence of his refusal must be referred. [p. 440, col. 1.]

The Court-fee to be paid on a claim for possession of a house on the ground that the defendant is a tenant holding over and refuses to vacate it even though his tenancy had terminated and he was given a proper notice to quit, is *ad valorem* on the rent payable for the year next before the institution of the suit under cl. xi (*cc*) of s. 7 of the Court Fees Act and not on the market-value of the house under cl. v (*e*) of the section. [*ibid.*]

Champat v. *Balakdas* (1), dissented from.

Application for revision against an order of the Additional District Judge, Akola, dated the 29th June, 1925, in Civil Appeal No. 82 of 1925.

Messrs. *A. V. Khare* and *W. B. Pendharkar*, for the Applicant.

Mr. *Abdul Razak*, for the Non-Applicants.

ORDER.—The question referred for the decision of the Bench is whether the Court-fee to be paid on the claim for possession of a house which is included in the plaint is to be calculated on the market-value of the house under cl. v (*e*) of s. 7 of the Court Fees Act or on the rent payable for the year next before the institution of the suit under cl. xi (*cc*) of the same section.

The plaintiff sued for possession of the house and arrears of rent on the following allegations. On the 12th of March, 1908, he let it to Gulam Husen, father of the two defendants, for eleven months at a rent of two rupees a month, and Gulam Husen executed what is called a rent-note stating those terms. He continued to occupy the house on the same terms till his death on the 17th of August, 1916 and then the first defendant Gulam Ahmad agreed to continue to do so, and did so with his brother, the second defendant. Thereafter they paid no rent and were frequently told to pay up or quit. Eventually the plaintiff gave them a written notice on the 4th of December 1923 to quit at the end of the month, but they failed to do so. The present suit was, therefore, filed on the 19th of February, 1924, for the recovery of possession from the defendants and for Rs. 70 as the rent for the last two years and eleven months.

The calculation of the Court-fee payable on the claim for possession purports to be made under cl. xi (*cc*) of s. 7 of the Court Fees Act, the claim being treated as one for the recovery of immoveable property from a tenant holding over after the determination of the tenancy. In that case the basis for the calculation of the Court-fee is the rent payable for the year next before the date of presenting the plaint, that is Rs. 24. In the plaint, however, it is stated that the Court-fee is based on the rent for two years, and even that is put down as Rs. 96, which is the rent for four years.

The defendants raised the plea that the plaint was not sufficiently stamped, as the Court-fee payable on the claim for possession should be calculated on the market-value of the house under cl. v (*e*) of s. 7. This is perhaps the commonest of the many pleas that are invariably taken just because they are there to take, without any thought of the profit or loss resulting from their success. The defendants could not possibly get any advantage out of the payment of a higher fee by the plaintiff, even if he failed in his suit, and would have to pay it themselves if he succeeded. There can be no objection to vigilant defendants looking after the interests of the public revenues, even at their own expense, but it would ordinarily be wiser to leave that to the Court, whose business it is. These defendants not only took the plea and pressed it successfully, but they contested the plaintiff's appeal against the order on it and have contested his application for revision of the appellate order in this Court, and also in both the lower Courts they urged and tried to prove that the market-value of the house was higher than it was found to be.

It has been held in both the Courts below on the authority of this Court's ruling in *Champat* v. *Balakdas* (1) that the Court-fee on the claim for possession is payable on the market-value of the house under cl v (*e*) of s. 7 of the Court Fees Act, not on one year's rent under cl. xi (*cc*) of that section. The plaintiff contends that that ruling is mistaken and has applied for revision of the order, having obtained an extension of the time within which the balance of Court-fee is to be paid till the case has been decided. One of us doubted the correctness of the view set out in *Champat* v. *Balakdas* (1)

(1) 84 Ind. Cas. 202; 20 N. L. R. 124; A. I. R. 1925 Nag. 131.

and accordingly referred the case to a Bench.

The view taken in the case mentioned was that a tenant by express agreement became a trespasser and not a tenant holding over as soon as he refused to comply with a proper notice to quit. It was accordingly held that a suit for recovery of the land filed after his refusal was not a suit against a tenant holding over and Court-fees must be paid according to cl. v (*e*) of s. 7 of the Act.

It is undoubtedly correct to say that a tenant or a tenant holding over is a trespasser and not a tenant of any kind after he has refused to comply with a proper notice to quit. But the claim in a suit must be regarded with reference to the facts existing when the cause of action accrued, not to the state of things when the suit was filed. Up to the moment he gives rise to a cause of action by refusing to quit on demand, a tenant is still a tenant, and that is the point of time to which the suit for his ejectment in consequence of that refusal must be referred. If it were correct to look at the facts as they stood when the suit was filed in this connection, there could be no such thing as a suit for the ejectment as a tenant, and cl. xi (*cc*) of s. 7 of the Court Fees Act, which was added to it in 1905, would be futile, along with practically all the provisions of the law in regard to the ejectment of tenants.

A good deal has been said about the difference between a tenant of the ordinary kind, that is one by express agreement, and a tenant holding over, but the matter is irrelevant because cl. xi (*cc*) includes tenants holding over in the term *tenant*. The question of the proper definition of a tenant holding over arose, or was thought to arise, in the ruling under discussion, because our learned brother was examining the position of the defendant after his refusal to quit; at that time he was certainly not a tenant by express agreement, and it was obviously correct to hold that he was not a tenant holding over, according to the definition in Wharton's Law Laxicon there quoted. But in our view it is not the position of the defendant after his refusal to quit that is in question but his position up to that refusal.

We hold, accordingly, that the Court-fee payable on the claim for possession of the house should be calculated on Rs. 24, the rent payable according to the plaint for the year next before it was presented. The case will be returned with this statement of opinion.

ORDER.

Prideaux, A. J. C.—(*October 8th, 1926*). —On the decision come to by the Bench (a copy of which is to go to the Court below) it is clear that this case must go back to the original Court for a decision on the merits. I direct accordingly. Costs in the two lower Courts to date except the plaint fee to be paid by the defendant. Costs here to be also paid by him. Other costs to abide the result. I fix Pleader's fees at Rs. 50.

G. R. D. *Order accordingly.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 852 OF 1924.

November 18, 1926.

Present:—Mr. Justice Dalal and Mr. Justice Pullan.

BENGAL AND NORTH-WESTERN RAILWAY—DEFENDANT—APPELLANT

versus

MATRU RAM AND ANOTHER—PLAINTIFFS AND B. B. AND C. I. RAILWAY—DEFENDANTS—RESPONDENTS.

Railways Act (IX of 1890), s. 55—Rules framed under s. 47 (f), r. 12—Sale of goods by Railway Company—Sale without proper demand for charges, legality of—Sale before six months, effect of—Illegal conversion of goods—Sale of entire consignment when proper.

A Railway Company, without making a demand for a fixed sum for its charges, sold the goods consigned before the expiry of six months from the date of consignment. In a suit against the Company for damages for illegal conversion:

Held, (1) that in the absence of a demand for a fixed sum the Company was not empowered to sell the goods under s. 55 of the Railways Act; [p. 441, col. 1.]

(2) that failing the protection of s. 55 of the Act, the Company ought to have kept the goods for six months under r. 12 of the rules framed under s. 47 (*f*) of the Act; and [*ibid.*]

(3) that the sale being in contravention of the said rule amounted to illegal conversion. [*ibid*]

Held, further, that under s. 55 of the Railways Act, a Railway Company has no power to sell an entire consignment where the sale of a portion alone would satisify its demand. [*ibid.*]

Second appeal from a decree of the Second Additional Judge, Gorakhpur, dated the 10th of March, 1924.

Dr. *S. N. Sen*, for the Appellant.

Messrs. *P. L. Banerji* and *Janaki Prasad*, for the Respondents.

JUDGMENT.—This is a second appeal. Both the subordinate Courts have held that the defendant Railway Company unlawfully converted the goods of the plaintiff, which were in its custody. A consignment of salt was despatched from Kharaghoda (Bombay Presidency) to Deoria in the Gorakhpur District. Out of seven wagon loads, four got damaged through wet, when the salt was received at Deoria. The finding is in the appellant's favour that the Company was not responsible for the damage. The plaintiff refused to take delivery and the salt was sold at auction by the Company in October, 1921. The salt was booked in June so the Company kept custody of it for less than six months.

According to the lower Appellate Court the Company acted unlawfully in selling the salt without giving to the plaintiff 15 days' clear notice as required by s. 55 of the Railways Act. In this Court the Counsel for the appellant was prepared to satisfy us that proper notice was given. We did not accept this additional evidence because the appeal must fail on another ground. Section 55 does not apply because the Railway Company never presented a proper bill to the plaintiff. It did not come to any determination as to what should be charged for wharfage. At one time, it was willing to give up that charge, at another time it was desirous of coming to terms over damages. When the Company's demand was not a fixed sum, it cannot have a lien over goods under s. 55 and cannot sell to produce a sum equal to the demand. Moreover, the entire consignment cannot be sold under the provisions of that section but only so much as would satisfy the demand.

Failing protection of s. 55, the Company ought to have kept custody of the goods for six months under r. 12 of the rules framed under s. 47 (*f*) of the Act. This was not done and the sale in contravention of that rule amounted to illegal conversion.

It was argued on behalf of the appellant that the plaintiff had not set up a case of unlawful conversion. This is inaccurate. In para. 6 of the plaint the complaint is made that the goods were sold at auction contrary to law. It is true that the trial Court did not frame a specific issue on the subject but the omission has not prejudiced the appellant. It was not denied that the goods were sold within six months of arrival and even of booking.

The amount of damage has been rightly assessed and we would not interfere with a matter which under the circumstances of the present case does not arise in second appeal.

It was argued half heartedly that salt was a perishable article and so the Company was authorised to sell it at once. In fact, the Company did not sell it at once but about three months after the arrival of the consignment. It is clear that the Company had no intention of treating salt as a perishable article.

We dismiss the appeal with costs, which shall be on the higher scale here.

A. N. A. *Appeal dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1023 OF 1926.

November 3, 1926.

Present:—Mr. Justice Dalip Singh.

MUHAMMAD AYUB—PLAINTIFF—APPELLANT

versus

Musammat FATIMA SULTAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Redemption suit—Onus of proving transaction and its essentials—Mortgage-deed unregistered—Proof of transaction—Suit for redemption, whether maintainable.

A suit for redemption cannot be maintained by a mortgagor, where the mortgage-deed is inadmissible and the mortgagor cannot consequently prove the transaction and its essentials. [p. 442, col. 2.]

In a suit for redemption, the mortgage transaction must be proved by the person seeking redemption. Though in a particular case the onus of showing the extent of the charge, where it is a matter of accounts, may lie on the mortgagee, as a general rule the mortgagor must prove the transaction, the essentials of the transaction being the sum for which the mortgage is made and the terms, if any, as to interest and duration. [*ibid.*]

Second appeal from a decree of the Senior Sub-Judge, Rohtak, dated the 1st February, 1926, reversing that of the Fourth Class, Sub-Judge, Sonepat, dated the 7th July, 1925.

Mr. *Mehr Chand Mahajan* for Bakhshi *Tek Chand*, for the Appellant.

Mr. *Shamair Chand*, for the Respondents.

JUDGMENT.—The plaintiff in this suit asked for possession in respect of a house by way of redemption on payment of Rs. 130-13-4. The defendants denied the *factum* of the mortgage and denied the receipts of any portion of the mortgage-

money. They also pleaded that the mortgage-deed or its duplicate (*musanna*) was inadmissible in evidence for want of registration. They also pleaded adverse possession. The trial Court decreed the suit on payment of Rs. 410-13-4. The learned Senior Sub-Judge held that neither a mortgage nor a subsisting right of redemption had been proved and dismissed the suit. The learned Senior Sub-Judge also held that the counter-part was inadmissible in evidence to prove either the *factum* of the mortgage or the date of the mortgage because the date of mortgage was not a collateral purpose. This document has throughout been called a counter-part. It is conceded before me that it is not a counter-part but a duplicate or a copy. Counsel for the respondents has objected that there is no proof that this is a true copy of the mortgage. But this point was never raised in the Court below and even if it can be raised I consider that in the circumstances of this case, there is sufficient ground to base an inference that it was a correct copy. Counsel for the appellant has urged that the counter-part of the mortgage-deed can be looked at to prove the nature of the mortgagee's possession. He cites *Varada Pillai* v. *Jeevarathnammal* (1), a Privy Council ruling, *Qadar Bakhsh* v. *Mangha Mal* (2) and *Ata Muhammad* v. *Shankar Das* (3). He has also cited *Chhottalal Aditram* v. *Bai Maha Koer* (4) and *Bishan Das* v. *Ram Singh* (5). He also raised a further point that if the nature of the possession can be proved by these means and the *factum* and date of the mortgage can be proved *aliunde* then if he has proved the *factum* of the mortgage, its date and its continuance he has proved that there is a subsisting mortgage. The right of redemption is incidental to a mortgage and, therefore, according to him his suit for redemption must be decreed. He admits that on this argument a mortgagor would be able to redeem a mortgage with paying anything or at any rate without paying anything but a nominal sum because the mortgagee in such a case would be unable to prove the amount of the charge and, therefore, as the onus would lie on the mortgagee to prove the charge, redemption could be had at the will of the mortgagor and on such term as he chose to admit. Counsel for the respondents urges, on the other hand, that the onus of proving the amount of the charge lies on the mortgagor and that if he fails in this he cannot sue to redeem. He further urges that the charge being a term of contract cannot be proved as the deed is inadmissible in evidence. His second argument is that there is a distinction between the cases mentioned in *Varada Pillai* v. *Jeevarathnammal* (1), *Qadar Bakhsh* v. *Mangha Mal* (2) and *Ata Muhammad* v. *Shankar Das* (3) and a mortgage-deed. He admits that the nature of the possession of the mortgagee might be proved by the counter-part but he contends that this is not sufficient. In a suit for redemption the mortgage has to be proved as a transaction and the nature of the possession alone does not confer any right on the mortgagor. As the mortgage cannot be proved as a transaction the suit for redemption must fail. The point is by no means free from difficulty. On the whole, however, I am of opinion, that the appellant must fail. Where the position of the appellant conceded or held to be correct it would follow that wherever a mortgage-deed which required registration was not registered the plaintiff could have redemption on payment of nothing at all. I do not think that such a position was ever contemplated by the law and it would be stultifying the Registration Act if such were held by the Court. Be that as it may, I consider that in a suit for redemption the mortgage transaction has got to be proved by the redemptor. It may be that the onus of showing the extent of the charge in a particular case may lie on the mortgagee where it is a matter for accounts. But it seems to me that a mortgagor must prove the transaction and the essentials of the transaction are the sum for which the mortgage was made and the terms, if any, as to interest and duration. None of these can be proved by the mortgagor in a case like the present and, therefore, it follows that he is unable to prove the transaction on which he basis his suit and, therefore, he must fail. I, therefore, dismiss the appeal but as the point is difficult and the appellant had some justifica-

(1) 53 Ind. Cas. 901; 43 M. 244; (1919) M. W. M. 724; 10 L. W. 679; 24 C. W. N. 346; 38 M. L. J. 313; 18 A. L J. 274; 46 I. A. 285; 2 U. P. L. R. (P. C.) 64; 22 Bom. L. R. 444 (P. C.).

(2) 73 Ind. Cas. 889; 4 L. 249; 5 L. L. J. 175 & 555; A. I. R. 1923 Lah. 495.

(3) 88 Ind. Cas. 872; 6 L. 319; A. I. R. 1925 Lah. 491; 7 L. L J. 504.

(4) 40 Ind. Cas. 83; 41 B. 466; 19 Bom. L. R. 322.

(5) 61 Ind. Cas. 399; 3 U. P. L. R. (L) 43.

tion for his suit I leave the parties to bear their own costs throughout.

R. L.
A. N. A.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No 1351 OF 1923.
March 24, 1926.

Present :—Sir Victor Murray Coutts Trotter, KT., Chief Justice.

KROVI SUBBA RAO—PLAINTIFF—APPELLANT

versus

DHULIPALA NARASIMHAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 53—Colourable transaction, effect of—Proceeding to set aside transaction, whether necessary.

A colourable transaction which leaves all the beneficial interest in the property purported to be transferred in the transferor is void and of no effect and no proceedings need be instituted to set it aside.

Second appeal against the decree of the Court of the Subordinate Judge, Kistna at Masulipatam, in A. S. No. 8 of 1922 (A. S. No. 105 of 1921 on the file of the District Court, Kistna) presented against the decree of the Court of the District Munsif, Masulipatam, in O. S. No. 279 of 1918.

Mr. *V. Ramadoss*, for the Appellant.

Messrs. *V. Krishna Mohan* and *P. Somasundaram*, for the Respondents.

JUDGMENT.—The plaintiff is the appellant here and he lost his suit because both the lower Courts have found as a fact that the document on which he relied as showing his title to the property was not merely a voidable instrument as being executed to defraud creditors, though a real transfer properly made, but was a colourable transaction throughout leaving all the beneficial interest of possession in the property in the assignor. That being so, it would be covered not merely by the Full Bench decision in *Ramaswami Chettiar* v. *Mallappa Reddiar* (1), but it would be covered by my own judgment in *Palaniandi Chetty* v. *Appavu Chettiar* (2), where I guarded myself expressly by saying that had the transaction been a merely colourable one the plaintiff would not have succeeded in his action. The further point that I held that in cases where the transaction was not void but merely voidable the plaintiff's remedy was merely to bring proceedings for the express purpose of setting aside the transaction for the benefit of himself and all other creditors has been disapproved by the Full Bench, and all that is necessary to point out is that the Full Bench decision on that point does not arise in this appeal. From that point of view it is obvious that there were ample materials for the learned Judges below to find as they did, and this second appeal involves, as so many second appeals do, when you get to the real point, a mere question of fact with which I have no jurisdiction to deal. The second appeal must be dismissed with costs of the 4th respondent.

V. N. V.
Z. K.

Appeal dismissed.

(1) 59 Ind. Cas. 947; 43 M. 760; (1920) M. W. N. 572; 39 M. L. J. 350; 28 M. L. T. 170; 12 L. W. 475 (F. B.).

(2) 34 Ind. Cas. 778; 30 M. L. J. 565; 19 M. L. T. 390.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 858 OF 1924.
November 12, 1926.

Present :—Mr. Justice Boys and Mr. Justice Kendall.

SHIAM LAL—PLAINTIFF—APPELLANT

versus

GIRRAJ KISHORE AND OTHERS—DEFENDANTS—RESPONDENTS.

C. P. C. (Act V of 1908), s. 60, O. XXI, rr. 53, 73—Pleader's clerk, whether can purchase in Court sales—Decree, attachment and sale of, whether legal.

A Pleader's clerk is not a person who has 'duties to perform in connection with the sale' within the meaning of O. XXI, r. 73, C. P. C., and, therefore, is not debarred from purchasing in Court sales. [p. 444, col. 2.]

The sale of a decree in execution of another decree is not a nullity; the utmost that can be said with regard to such a sale is that it is irregular. [*ibid.*]

Fateh Lal v. *Sher Lal* (1), approved.

A person at whose instance a decree is sold cannot subsequently impugn the validity of the sale on the ground that the decree could not be sold under O. XXI, r. 53, C. P. C. [p. 445, col. 1.]

Second appeal from a decree of the Additional Subordinate Judge, Aligarh, dated the 18th February, 1924.

Messrs *S K. Dar* and *Benod Behari Lal*, for the Appellant.

Mr. *Hazari Lal Kapoor*, for the Respondents.

JUDGMENT.—Shib Singh and his brother got a decree (No. 202 of 1912) for

costs for Rs. 56 against Fateh Singh. This same Fateh Singh had a Revenue Court decree (No. 28 of 1916) for Rs. 189-11-9 against Shib Singh and his brother. Shib Singh proceeded to execute the decree and attached the decree No. 28 of 1916 of Fateh Singh. It was put up for auction, and one question that has been argued before us in this case is whether that was, in view of the terms of O. XXI, r. 53, a proper procedure. At the sale the property was purchased by Shiam Lal, the present appellant here, for the sum of Rs. 50. Shiam Lal was the clerk of a Pleader of Shib Singh. No objection was made by either Shib Singh or by Fateh Singh to this purchase by Shiam Lal, that is to say, neither of them raised an objection that under the terms of O. XXI, r. 73. Shiam Lal, as clerk of the decree-holder's Pleader, was prohibited from purchasing. This is another question with which we are concerned. Subsequently, Shib Singh actually withdrew the Rs. 50. Next come the proceedings which are alleged by the present appellant to have been, and which indeed appear to have been, fraudulent. Fateh Singh, notwithstanding the fact that his decree (No. 28 of 1916) had been sold, proceeded to execute it against Shib Singh. What exactly then followed has not been made very clear; but it is clear enough for the purposes of the present appeal that Shib Singh objected, and in the event Fateh Singh and Shib Singh compromised the matter on certain terms, with which we are not concerned. Sometime afterwards was instituted the present suit. Shiam Lal did not proceed to execute the decree against Fateh Singh, which he had purchased, but sued Fateh Singh and Shib Singh for recovery of the whole of the amount of that decree as on the date of the compromise. This sum he claimed from Fateh Singh alone, but in the alternative he claimed Rs. 50 from Shib Singh and the balance from Fateh Singh. Shib Singh made no defence. Fateh Singh set up the defence that the purchase by Shiam Lal was a nullity, relying upon O. XXI, r. 73 and urging that a Pleader's clerk could not buy at the auction sale. This defence found favour with the trial Court. On appeal the lower Appellate Court not only agreed in this view but went on to hold that in view of the terms of O. XXI, r. 53 a decree that has been attached could not be sold and the procedure provided by O. XXI, r. 53 must be followed. Shiam Lal appeals to this Court, urging that the view of the lower Appellate Court on both points was wrong.

The case first of all came before our brother Mr. Justice Mukerji who referred it to a Division Bench in regard to the effect of O. XXI, r. 73. He pointed out that the question is not covered by any authority and we fully agree with him that it is an important point in relation to the conduct of legal practitioners' clerks. He did not refer the question of the effect of O. XXI, r. 53 no doubt, because he had already expressed his views in *Fateh Lal* v. *Sher Singh* (1) but at the same time he referred the whole case and we have to deal with it.

To consider first the effect of O. XXI, r. 73 we are unable to hold that in the ordinary meaning of the language a clerk of a Pleader is a person who has "duties to perform in connection with the sale." First of all, reading the words "or other person" in connection with the words "no officer" it appears to us that r. 73 is intended to prohibit all those who have anything to do with the machinery of the sale having any interest in the result of the sale. That interest must not be direct or indirect, but we cannot find in this case that there is any suggestion beyond that Shiam Lal was his clerk, that the Pleader had an interest in the purchase. We are not, therefore, concerned with the fact that in one aspect the Pleader himself may be regarded as an officer of the Court, though we may note that it has been held in *Alagirisami* v. *Ramanathan* (2) that the corresponding section then in force did not prevent a Pleader from purchasing. We are, however, only concerned with the position of a Pleader's clerk and we are unable to hold that he was debarred from purchasing by the terms of O. XXI, r. 73.

We turn now to the second point, whether in view of O. XXI, r. 53 the sale was a nullity. At the outset, we may say that this question does not really in the peculiar circumstances of the case call for determination. As regards Shib Singh the clear facts are that the sale took place at his own instance and but for his action never would have taken place and further he himself reaped the benefits of that sale in that he became entitled to, and did

(1) 85 Ind. Cas. 660; L. R. 6 A. 63 Civ.; A. I. R. 1925 All. 264.

(2) 10 M. 11; 3 Ind. Dec. (N. S.) 827.

actually withdraw the Rs. 50 purchase-money paid by Shiam Lal. As to Fateh Singh he also must be presumed to have had due notice of the sale. The Counsel for Fateh Singh's representative in-interest here admits that no objection has been taken hitherto that Fateh Singh had no notice of that sale. Nor is he even in a position to substantiate such an assertion here. Neither at the sale nor subsequently has Fateh Singh made any attempt to object to the purchase by Shiam Lal. It appears to us clear then beyond doubt that neither Shib Singh nor Fateh Singh can be allowed to object to the sale in the present case.

We think, however, as the point has been argued before us, that it is desirable to express shortly our views as to the effect of O. XXI, r. 53. In the case decided by Mr. Justice Sulaiman and Mr. Justice Mukerji, reported in *Fateh Lal* v. *Sher Singh* (1) reliance was placed on the terms of s. 60 of the C. P. C. and it was noted that the Schedule of which O. XXI, r. 53, constitutes a part only deals with procedure. Of course, in one sense s. 60 also only deals with procedure; but there is a clear distinction between the sections of the Act and the Schedule, which can be altered or added to at any time by the various High Courts. If it were, therefore, necessary to decide the point, we would not be prepared to differ from the view expressed in that case.

The result is that allowing the appeal, we set aside the decrees of the Courts below, and decree the plaintiff's claim for recovery of the whole amount as due under the decree No. 28 of 1916 from Fateh Singh alone. The appellant will have his costs throughout.

A. N. A. *Appeal allowed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL MISCELLANEOUS APPEAL No. 24 OF 1926.

September 3, 1926.

Present:—Mr. Kinkhede, A. J. C.

ASARAM—APPELLANT

versus

KANCHEDILAL—RESPONDENT.

C. P. Tenancy Act (I of 1920)—C. P. Land Revenue Act (II of 1917), s. 138—Rent sale of absolute occupancy—Auction-purchaser, whether gets property free of all incumbrances.

In view of the absence of any provision in the C. P. Tenancy Act analogous to that of s. 138 of the C. P. Land Revenue Act an auction-purchaser of an absolute occupancy holding in execution of a rent-decree does not get the property sold free of all incumbrances.

Appeal against appellate decree of the District Judge, Hoshangabad, dated the 4th March, 1926.

Mr. *J. Sen*, for the Appellant.

Mr. *S. B. Gokhale*, for the Respondent.

JUDGMENT.—The first point argued is that the auction-purchaser in execution of a rent-decree of an absolute occupancy holding gets the property free of all incumbrances. There is no authority for this view. In the absence of any provision in the C. P. Tenancy Act analogous to that of s. 138 of the Land Revenue Act 1917, I am not prepared to uphold this contention. The auction-purchaser steps into the shoes of the holder of the first charge and has the capacity to redeem *qua* holder of the equity of redemption. He has the option to fall back on the prior charge or offer to redeem the mortgage in suit.

The second point argued is that of the plaintiff's mortgage being voidable, for want of consent. The finding of the lower Appellate Court on that point is that the mortgage was consented to by the landlord through one Ramchandra *Munim*. It is a finding of fact and I cannot interfere with it.

The third contention is that the present suit is barred by O. II, r. 2, C. P. C. The cause of action for the possessory suit is different from the cause of action on what the present suit is based. It is not the appellant's case that this cause of action was enforceable by suit even then.

The last point is one of limitation. I fail to see how the suit to enforce the mortgage could come within the purview of Art. 1 of Sch. II of the Tenancy Act of 1920.

The appeal fails and is dismissed with costs. Pleader's fees Rs. 50.

A. N. A. *Appeal dismissed.*

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 328 OF 1926.

November 12, 1926.

Present:—Mr. Justice Jai Lal.

NARAIN SINGH AND OTHERS—DEFENDANTS—JUDGMENT-DEBTORS—PETITIONERS

versus

KALI RAM—PLAINTIFF—DECREE-HOLDER—RESPONDENT.

Custom—Ancestral immoveable property—Trees

standing on ancestral land, liability of, to attachment and sale in execution of money-decree—Punjab General Clauses Act (I of 1898), s. 26.

Trees standing on ancestral land are ancestral immoveable property and as such are exempt from attachment and sale in execution of a money-decree obtained against a deceased proprietor even though planted by him unless they are charged with the decretal amount.

Achhru Ram v. *Maula Bakhsh* (2), distinguished.

Petition for revision under s. 44 of Act VI of 1918, against a decree of the Senior Sub-Judge, Ambala, dated the 13th March, 1926, reversing that of the Fourth Class Additional Sub-Judge, Ambala, dated the 30th November, 1925.

Mr. *Shamair Chand*, for the Petitioners.

Mr. *Devi Dayal Kapur*, for the Respondent.

JUDGMENT.—In the execution of a money-decree against the estate of one Gunni Ram certain trees standing on his ancestral land were attached. Objection was raised by legal representatives of Gunni Ram to the attachment of the trees on the ground that they were immoveable property and as they were planted by Gunni Ram on the ancestral land, they also became ancestral immoveable property, and that, therefore, their attachment and sale was prohibited by virtue of *Jagdip Singh* v. *Narain Singh* (1). This judgment prohibits the attachment and sale of ancestral immoveable property, in execution of a money-decree obtained against a deceased proprietor when such property has descended to his male heirs unless it is charged with the decretal amount. The learned Senior Sub-Judge has held that the trees did not fall within the definition of 'land' as contained in the Punjab Alienation of Land Act, and, following *Achhru Ram* v. *Maula Bakhsh* (2), has held that they are attachable.

With this view of the learned Judge I do not agree. What is prohibited is the attachment and sale of immoveable property and not merely of 'land' and the question is arguable whether for the purpose of this case there is any difference between the definition of land and immoveable property. Be that as it may, I am satisfied that having regard to the definition of 'immoveable property' contained in cl. 26 of s. 2 of the Punjab General Clauses Act the standing trees are included in the definition of such property. *Achhru Ram* v. *Maula Bakhsh* (2) has no bearing on the present case because that case concerned the definition of land as contained in the Punjab Alienation of Land Act. The trees in question fall within the prohibition contained in *Jagdip Singh* v. *Narain Singh* (1) because though they were planted by the deceased Gunni Ram this was done on land which is admittedly ancestral and, therefore, became a part thereof and for the present purpose are governed by the same rule as the land on which they stand. As admittedly the land was not attachable it follows that the trees also were not attachable. I accept this petition, set aside the order of the Senior Sub-Judge and remand the case to the Executing Court with direction to proceed with execution in accordance with law. The respondent will pay the costs of the petitioner throughout.

R. L. *Case remanded.*

(1) 15 Ind. Cas. 866; 4 P. R. 1913; 160 P. W. R. 1912; 173 P. L. R. 1912.

(2) 84 Ind. Cas. 89; 5 L. 385; A. I. R. 1925 Lah. 29; 1 L. C. 238.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1708 OF 1923.

August 27, 1926.

Present :—Mr. Justice Curgenven.

SANAMPUDI VENKAYYA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL REPRESENTED BY THE COLLECTOR OF NELLORE—DEFENDANT—RESPONDENT.

Water rights—Grant by Government of land through which non-navigable river flows—Bed of stream, ownership of—Presumption.

Where a grant of land is described as bounded by a non-navigable river, the onus of showing that the grant did not cover the bed of the river *ad medium filum aquæ* is on the grantor, the presumption being strong or weak according to the circumstances of the particular case. [p. 447, col. 2.]

Where a water-course not merely bounds but flows through the land of the grantee, the presumption must necessarily be stronger, and, where no express reservation exists, it lies on the grantor to show that the presumption should not prevail. [p. 448, col. 1.]

Olappamananna Nanakal v. *Secretary of State* (2) and *Vasireddi Venkata Lakshmi Narasamma* v. *Secretary of State* (1), followed.

Second appeal against a decree of the Court of the Additional Subordinate Judge of Nellore, in A. S. No. 53 of 1922 (A. S. No. 237 of 1921 on the file of the District Court of Nellore), preferred against the decree of the Court of the Additional District Munsif of Nellore in O. S. No. 265

of 1919) O. S. No. 109 of 1919 on the file of principal District Munsif of Nellore.

Mr. *B. Somayya*, for the Appellants.

The Government Pleader, for the Respondent.

JUDGMENT.—The plaintiffs are proprietors of a *shotriem inam* or *kandriga* forming a portion of the Kanupur village, Nellore District. A jungle stream called the Surepallivagu, which rises in a *shotriem* village to the west of the plaintiffs' property, enters the *kandriga* and the plaintiffs have been in the habit of using it for irrigation purposes. Government served them with a notice under Madras Act VII of 1865 that they were liable to pay water cess in respect of the unauthorised use of the water of this stream. The plaintiffs, therefore, filed this suit for a declaration of their right to make use of the water without the payment of water cess. The Additional District Munsif of Nellore granted them the relief prayed for on a finding that the plaintiffs are the owners of the stream. The learned Subordinate Judge has reversed this decree and dismissed the suit and the plaintiffs now file this second appeal.

The question in issue has to be decided according as it is found that the bed of the stream is owned by the Government or by the grantees of the *inam*. The terms of the original grant are not now ascertainable but the Inam Fair Register of 1861 shows upon what terms it was then confirmed. According to the entry (Ex. VI) in this register the *inam* consisted of 28·906 acres. The recommendation of the Inam Commissioner runs as follows:—

"This is a *grama garbha kandriga*. In the present accounts the extent of *poramboke* also is included under the head of *pullari* waste. The *minha* land is said to be *Isavadu* lands and land occupied by a tank and about 4 or 5 houses. As the whole is situated within the boundaries of the *kandriga*, it does not signify under what head it is entered. The wet land is irrigated under tank belonging to the *kandrigars*. No Sircar water is supplied. So I recommend the whole to be confirmed as dry. Nearly 20 *gortus* are cultivated with dry crops and only one or two *gortus* with wet crops. The lands are cultivated by the *inamdars* themselves. According to the classification of *Fasli* 1215 the *taram* assessment of dry (42 *gortus*) amounts to Rs. 296. Charging for the wet land Rs. 3-10 at the highest dry rate, it amounts to Rs. 32. Charging for the remaining unclassified lands at one rupee for *gortu* the total assessment amounts to Rs. 374. But the *inamdars* and *karnams* positively say that the *kandriga* does not yield so much as to pay up the *jodi* but I have no ground on which I can give a deduction to the *taram* assessment. However, on the statement of the *karnams* I propose to give a deduction of Rs. 75 and adopt Rs. 300 as the value of the *kandriga*."

So far as I understand the tenor of this note, the whole of the *poramboke* and other uncultivated land was taken to be included in the grant. '*Pullari* waste' means, I am informed, land fit for pasturage but not for cultivation. And it appears probable that stream beds, which are usually dry for a great part of the year, were included as *poramboke* in that classification. This view seems to be borne out by the method by which the total assessment of Rs. 374 is arrived at; because it will be seen that no portion of the land within the boundaries of the *inam* is excluded as not liable to assessment. I think that the effect of this entry is clearly to negative the theory that there was any reservation made of land, whether as stream bed or other, within the boundaries of the *inam* either at the time of the original grant or at the time of the *inam* settlement.

The law with regard to the ownership of the bed of a water-course either adjoining or running through a private property has been examined in the Full Bench case *Vasireddi Venkata Lakshmi Narasamma* v. *Secretary of State* (1). The question that arose there was whether any part of the Thungabadra river upon the bank of which were lands granted to a certain temple could be held to be comprised within the grant. Sir John Wallis, C. J., on behalf of the Full Bench expressed the opinion that the result of the authorities, as regards grant of land in India described as bounded by a non-navigable river, was that the onus of showing that the grant did not cover the bed *ad medium filum aquæ* is on the grantor, the presumption being strong or weak according to the circumstances of the particular case. It was not considered desirable to attempt to lay down any more definite rule. It need, I think, scarcely be

(1) 47 Ind. Cas. 606; 41 M. 840; 35 M. L. J. 159; (1918) M. W. N. 662 (F. B.).

added that, when a water-course not merely bounds but flows through the land of the grantee, the presumption must necessarily be stronger, and, where no express reservation exists, it lies on the grantor to show that the presumption should not prevail. A case more similar to the present one is *Olappamananna Nanakal* v. *Secretary of State* (2), where a South Malabar *jenmi* sued the Secretary of State to obtain a declaration that the bed of a stream running through his property belonged to him and that the Government had no right thereto. Following *Vasireddi Venkata Lakshmi Narasamma* v. *Secretary of State* (1), it was held that the presumption was in favour of the land-owner as riparian owner and that the Government had failed to rebut the presumption by proof of an alleged local usage according to which even non-navigable and non-tidal rivers belonged to Government. Similarly in the present case we start with the presumption in favour of the plaintiffs and the Government are unable, I think, to show by reference to the terms of Ex. VI that that presumption is displaced by any proof that the stream-bed was specifically excluded. The District Munsif was accordingly, in my opinion, right in his conclusion and I allow the appeal and restore his decree with costs to the plaintiffs in the lower Appellate Court and here.

V. N. V. *Appeal allowed.*

(2) 55 Ind. Cas. 770; 12 L. W. 371.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 84 OF 1925.

October 22, 1926.

Present:—Mr. Hallifax, A. J. C., and Mr. Mitchell, A. J. C.

JIJI BAI—PLAINTIFF—APPELLANT

versus

Chowdhary RATAN SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Hindu Law—Partition—Unregistered-deed, whether admissible to prove intention—Oral evidence of separation in status, whether admissible—Suit for possession by daughter—Separation in status proved—Decree for possession and partition, when can be claimed.

The plaintiff in a suit for possession of the property on the ground that his predecessor had separated in status from the defendants and was in separate possession of the property, if he cannot prove that any particular property was allotted to his predecessor's share and was separately held by him, is entitled to claim his undivided share in the common property and can get that share divided off from the share belonging to the defendants who are in possession of the whole. [p. 451, cols. 1 & 2.]

Per *Mitchell, A. J. C.*—If a partition is evidenced by an unregistered though compulsorily registrable deed, the combined operation of s. 49 of the Registration Act and s. 91 of the Evidence Act will completely shut out the evidence of the terms of the particular transaction of partition by preventing the person relying on the partition from proving that particular property was allotted to the share of one of the parties to the partition. But it cannot prevent him from proving that one of those parties was separate in status and was in separate possession of a particular property. [p. 449, col. 2.]

Chhotalal Aditram v. *Bai Mahakore* (1) and *Nilkanth Bhimaji* v. *Hanmant Eknath* (2), relied on.

An unregistered partition deed may be used to prove the intention of the parties to the partition and it will be corroborative evidence of the fact that the property was divided in a particular manner. [p. 450, col.1 .]

Janki Kuer v. *Birj Bhikhan Ojha* (3) and *Nadepena Appamma* v. *Saripilli Chinnavadu* (5), followed.

Per *Hallifax, A. J. C.*—Though an unregistered partition deed cannot be received as evidence of the terms of the partition, the fact that they were made out and signed is undoubtedly evidence, though, of course, not necessarily conclusive evidence, that a partition was made at that time, that is that there was a separation in status. [p. 451, col. 1.]

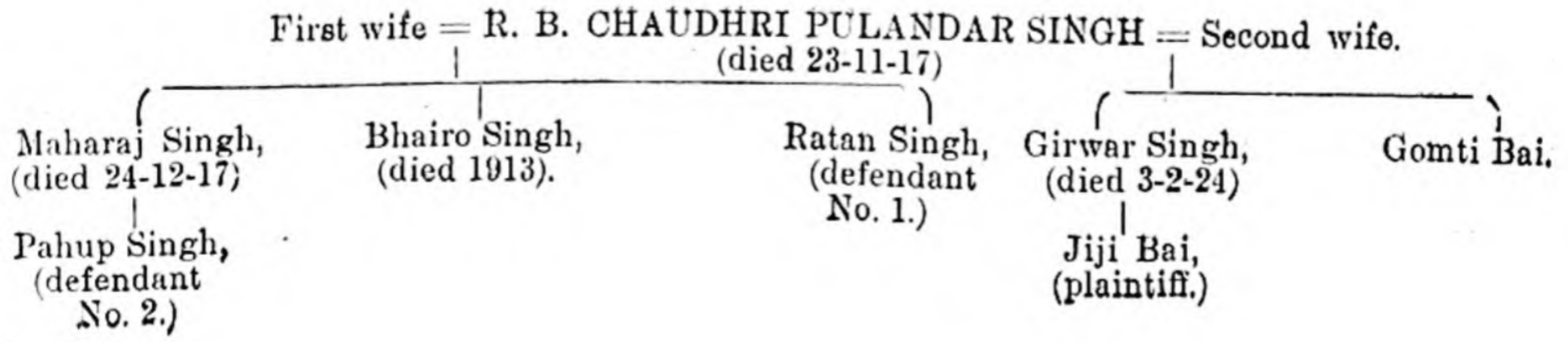
First appeal against a decree of the Additional District Judge, Narsinghpur, dated the 7th May, 1925, in Civil Suit No. 17 of 1924.

Sir *B. K. Bose*, Kt., and Mr. *K. B. Gupta*, for the Appellant.

Sir *Hari Singh Gour*, Kt., Messrs. *R. R. Jayavant* R. B. and *J. Sen*, for the Repondents.

OPINION.

Mitchell, A. J. C.—(*October 20, 1926*). —The following genealogical tree shows the relationship of the parties:—



The dispute relates to the property of R. B. Chaudhri Pulandar Singh, and is between the surviving descendants by his first wife. Pahup Singh and Ratan Singh, who are the defendants-respondents, and his grand-child by the second wife, *Musammat* Jiji, who sued for her father's share and was represented by her aunt *Musammat* Gomti Bai. The case for the plaintiff Jiji is that Pulandar Singh, shortly before he died in 1917, broke up the co-parcenary consisting of himself and his three surviving sons Maharaj Singh, Ratan Singh and Girwar Singh and divided the landed property among them, giving to each a list of the property allotted to him; and that this partition of the property was completed in July of the following year, when the household property and moveables were divided up and lists made out of the various shares. The plaintiff alleged that her father Girwar Singh remained in separate possession of his share until his death, on 3rd February, 1924, but the defendants, Ratan Singh and Pahup Singh, have taken possession of the whole estate, and are asserting that she has no interest. She based her claim distinctly on Girwar Singh's separate status and separate possession at the time of his death, and gave her cause of action as arising on his death and on her dispossession by the defendants and their denials of her title. The case for the defendants was that there was no partition and that Pulandar Singh before his death only indicated how partition should be made in the event of his sons separating.

The suit has not been decided on its merits and the plaintiff, so far, has lost her case entirely on a finding that the two lists of property are deeds of partition, that they should have been registered but being unregistered they cannot, by the operation of s. 49 of the Registration Act affect the property; and that by the operation of s. 91 of the Evidence Act no other evidence of the partition can be adduced. The lower Court had framed an Issue No. 4, covering the question of the separate possession of the parties (and presumably of Girwar Singh, the plaintiff's predecessor) but it held merely that "the alleged partition cannot be proved" and found the issue "in the negative."

During the preliminary stages of the trial the lower Court treated the issues relating to the admissibility of the partition lists as preliminary issues and recorded findings as already indicated, on 17th March, 1925. On 26th March, 1925, the plaintiff protested, claiming that she should be allowed to prove that the family was divided when Girwar Singh died, and to file lists of the property to which she is entitled. The lower Court held that the plaint was based on a definite partition which could not be proved, and that it would be improper to allow the plaintiff to amend her pleadings at that stage.

During argument in this appeal three distinct points emerged, relating to (1) the right of the plaintiff to prove the separate status and possession of her father, (2) the admissibility of the lists as evidence of the partition, and (3) the right of the plaintiff to ask for some alternative relief if she succeeds in proving her father's separate status but fails to estabtish the identity of the property in his possession. The finding of the lower Court that the lists are inadmissible in proof of the terms of the partition has not been challenged, though it seems open to doubt.

The view taken by the lower Court on the first point is clearly too narrow. The gist of *Musammat* Jiji's case is given in paras. 10 to 14 of the plaint, which show that her claim is based on the separate status and possession of her father from 1917 or 1918 till his death on 3rd February, 1924. The partition is not the logical basis of her claim, but is only an explanation of how it came about that Girwar Singh died a separate member of the family. All that the combined operation of s. 49 of the Registration Act and of s. 91 of the Evidence Act would effect in this case would be the complete shutting out of all the terms of that particular transaction of partition. In other words, it would prevent the plaintiff from proving that in that partition certain property was allotted to her father. But it would not prevent her from showing by other evidence that her father died separate from the rest of the family and in separate possession of certain property. These facts are not part of the "transaction," as contemplated in s. 49 of the Registration Act, or of the "disposition" as contemplated in s. 91 of the Evidence Act. The separate status and separate possession of her father was a continuing phenomenon. It may have had its origin in the alleged partition of 1917 and 1918, but a finding that these partitions may not be proved will not prevent the

plaintiff from proving all that is necessary in her case, that her father died separate and in separate possession of his share. The plaintiff must be given an opportunity to do so now. There are many clear authorities for this finding, but it will suffice to refer only to two leading cases, *viz.*, *Chhotalal Aditram* v. *Bai Mahakore* (1) and *Nilkanth Bhimaji* v. *Hanmant Eknath* (2).

On the second point also the finding of the lower Court is too narrow. It is now a well-established principle of law that though an unregistered partition deed may not be used to prove the terms of the partition yet it can be used to prove the intentions of the parties. In the present case, talk of partition was in the air, as pleaded by the defendants themselves, and these lists, though they do not effect the partition, are yet evidence of the intention of the parties at that time. It is open to the plaintiff to adduce evidence that her father died in separate possession of all or any of the property covered by these lists; and the lists will then be corroborative of her contention that in fact the property was divided in the manner pleaded by her. This finding is supported by many published rulings, including *Janki Kuer* v. *Birj Bhikhan Ojha* (3), *Varada Pillai* v. *Jeevarathnammal* (4) and *Nadepena Appamma* v. *Saripilli Chinnavadu* (5).

On the last point again the finding of the lower Court has been unnecessarily formal. It is true that the plaintiff alleged a partition and claimed that certain specified property had been allotted to her father, but the essence of her case was that her father died separate in separate possession of a share of the family property, and her claim was that she should be given his share. The lower Court held that as she could not prove the partition she could not be allowed to sue for the property in the possession of her father when he died, or to prove the details of the property she claimed. But the request involved no change in the character of the suit, or the addition of fresh pleadings. The plaintiff had been barred by the preliminary findings of the Court from proving the terms of a certain partition in support of her claim. As shown above she was entitled to fall back on any other evidence she had in order to prove the essence of her case that her father died separate and in separate possession of his share and all her request amounted to was the very reasonable one that the Court should frame issues so that she could do so.

The decree of the lower Court should be set aside and the case remanded for further trial. The lower Court may not treat the two lists as instruments effecting a partition, but it may use them as expressions of the intentions of the parties concerned at the time these lists were made and in support of any evidence she may have to show that Girwar Singh died in separate possession of property. The Court might enquire into the status of Girwar Singh at his death, and if he then held any of the family property in his own separate right; and it must allow the plaintiff an opportunity to prove that she is entitled to specific items of property. If she is unable to prove the specific items held by her father, she is entitled to demand that the equivalent of his one-third share shall be divided off and given to her. As the trial so far has been obscured by technical considerations it will be in the interests of parties if fresh pleadings are allowed before the issues are framed. The lower Court should also accept any relevant documentary evidence the parties may tender.

A refund certificate for the Court-fees in this Court should be issued to the appellant, who should receive her costs in this Court from the respondents, also all costs incurred so far in the lower Court, except the Court-fees paid on the plaint, which should follow the event.

Hallifax, A.J.C.—(*October 22, 1926*).—The plaintiff is the daughter of Girwar Singh Kurmi, and filed the present suit against two of her father's brothers and the son of another brother who is dead, alleging that her father separated from his brothers before he died and was in separate possession of his share of the family property, but the defendants had taken possession of it after his death and denied her title to it as his heir. She specified the property

(1) 40 Ind. Cas. 83; 41 B. 466; 19 Bom. L. R. 322.
(2) 58 Ind. Cas. 415; 44 B. 881 at p. 885; 22 Bom. L. R. 992.
(3) 79 Ind. Cas. 26; 3 Pat. 349; (1924) Pat. 185; 5 P. L. T. 541; A. I. R. 1924 Pat. 641.
(4) 53 Ind. Cas. 901; 43 M. 214; (1919) M. W. N. 724; 10 L. W. 679; 24 C. W. N. 346; 38 M. L. J. 313; 18 A. L. J. 274; 46 I. A. 285; 2 U. P. L. R. (P. C.) 64; 22 Bom. L. R. 444 (P. C.).
(5) 79 Ind. Cas. 510; 47 M. 203; (1923) M. W. N. 825; 45 M. L. J. 667; 33 M. L. T. 146; 19 L. W. 37; A. I. R. 1924 Mad. 292.

which, according to her, Girwar Singh owned separately, and put in certain documents in support of that allegation. It has been held in the lower Court that these documents, which have not been registered, are instruments of partition and require registration and, therefore, the plaintiff cannot use them to prove the partition, under s. 49 of the Registration Act, and as she is precluded by s. 91 of the Evidence Act from giving any other evidence of it, her suit must be dismissed.

It is at the most a subsidiary and unessential part of the plaintiff's case that a partition was made on a certain day and that certain property was then allotted to her father's share. As has been said, her case is that her father separated from his brothers at some time before his death and was at his death in separate possession of certain property which had once been joint family property. Even if the documents cannot be received as evidence of the terms of the partition, that is, as proof of what was allotted to Girwar Singh at a partition made at the time of his father's death, the fact that they were made out and signed is undoubtedly evidence, though, of course, not necessarily conclusive evidence, that a partition was made at that time, that is that there was a separation in status.

The correctness of the view that the two documents tendered in evidence are deeds of partition is open to great doubt; one appears to be a record of some of the property proposed to be allotted to Girwar Singh at a partition to be made later, and the other a record of the rest of the property allotted to him along with that in the first list in a partition then already made by arbitrators. But if they are admitted as evidence of what was allotted to Girwar Singh at the partition, it would still be necessary to prove what property was held by him separately later on, which may differ in some respects from the property mentioned in the lists as allotted or agreed to be allotted to his share. If it does differ, the lists are of little use; if it does not they are not necessary.

Anyhow the fact that the documents were drawn up and signed is admissible evidence of a separation in status between Girwar Singh and his brothers, which is all the plaintiff has to prove in order to get a decree for possession of her father's separate property. If she can prove further that certain property was allotted to her father's share, or merely was held separately by him at his death, she is entitled to get that property. If she cannot prove that then she is entitled to her father's undivided share in the common property, and she can get that share divided off from the shares belonging to the defendants, as they are in possession of the whole.

I agree in thinking that the decree of the lower Court should be set aside and the case remanded for trial, though that trial can hardly be described as "further," as that of the real case has not yet begun. There appears also to be no necessity for any further pleadings. All the facts that either party wishes to allege are on the record, anything further will only add to the mass of legal pleas already there in direct contravention of r. 2 of O. VI of the C. P. C. If, however, either party wishes to make a statement of any material fact not already stated on which reliance is placed, this should be allowed.

The defendants are responsible for the whole of the time and money already wasted over these infructuous proceedings, and, in my opinion, they ought to pay the whole of the costs incurred by the plaintiff up till now, except the Court-fees paid on the plaint and the memorandum of appeal; that on the plaint should follow the result of the suit and that on the memorandum of appeal will be refunded in due course.

JUDGMENT.—In accordance with the opinions separately delivered, the decree of the lower Court dismissing the suit will be set aside, and the case will be remanded to that Court with instructions to try it out according to law. The defendants will be ordered to pay the whole of the costs incurred by the plaintiff up till now, except the Court-fees paid on the plaint and the memorandum of appeal; that on the plaint will follow the result of the suit and that on the memorandum of appeal will be refunded in due course.

G. R. D. *Case remanded.*

MADRAS HIGH COURT.

CIVIL APPEAL No. 351 OF 1923.

August 6, 1926.

Present:—Mr. Justice Spencer and Mr. Justice Ramesam.

Afterwards:—Mr. Justice Ramesam and Mr. Justice Curgenven.

VAIDYANATHA IYER AND OTHERS—DEFENDANTS—APPELLANTS

versus

YOGAMBAL AMMAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Pensions Act (XXIII of 1871), s. 4—Suit for partition of inam *land, whether maintainable in Civil Court—Inam Rules, r. 5, cls. (1), (3)—Object of rules—Alienation of* inam *lands, whether void—Right of Government to resume—Lineal heirs of grantee, existence of, effect of—Statutes, construction of.*

Section 4 of the Pensions Act is confined in its operation to a grant of land revenue only as opposed to a grant of land and does not cover a case of grant of lands revenue free. [p. 452, col. 2.]

The jurisdiction of a Civil Court to entertain a suit for partition of unenfranchised hereditary personal *inams* is not ousted by anything in the Pensions Act. [p 455, col. 1.]

Rama v. *Subba* (5) and *Muthu Sri Jiejamba Bai Sahib* v. *Secretary of State* (6), distinguished.

Panchanadayyan v. *Nilakandayyan* (2), *Balvant Ramchandra Natu* v. *Secretary of State* (1), *Kumara Tirumalai Naik* v. *Bangaru Tirumalai Sauri Naick* (3) and *Babaji Hari* v. *Rajaram Ballal* (4), followed.

The object of r. 5, cl. 3 of the Inam Rules is to protect the interests of Government and the prohibition therein can only mean that, as against the Government, all alienations are inoperative, not that they are void. So long as Government do not step in to enforce their rights, whatever they are, by ignoring the alienation, it is not open to others to question a transaction which amounts to an alienation. [p. 453, col. 2; p 454, col. 1.]

Venkatarama Aiyar v. *Chandrasekara Aiyar* (9), *Dinvalu Lakshmipat* v. *Pingali Narasimham* (11) and *Boyanapalli Venugopala Row* v. *Pothapalli Venkata Narasimha Row* (10), followed.

So long as lineal heirs of the grantee of a personal *inam* exist Government has no right to resume and the property descends like ordinary property. [p. 454, col. 1.]

Per *Ramesam, J.*—An enactment of a character which deprives the subject of his right to resort to the ordinary Civil Courts of Justice for relief in certain cases ought to be construed strictly and the Court should not extend its operation further than the language of the Legislature requires. [p. 452, col. 2.]

Appeal against a decree of the Court of the Subordinate Judge, Tanjore, in O. S. No. 15 of 1920, dated the 16th April, 1923 and 27th April, 1923

Messrs *T R Ramachandra Iyer* and *T. M. Krishnaswami Iyer*, for the Appellants.

The Advocate-General, for the Respondents.

JUDGMENT.

Ramesam, J.—The 9th and 10th defendants are the appellants before us. The suit is for partition between the members of the family. The family had become divided in status long ago. The present suit is for division by metes and bounds. The plaintiff is the widow of one Muthusami Iyer who died in 1904 and claims under his Will. The appeal relates to the subject-matter of the 4th issue, namely, Items Nos. 1, 4, 6, 7 and 8 which are unenfranchised hereditary personal *inams*.

Two points have been raised for the appellants: (1) That the suit is not maintainable in a Civil Court under s. 4 of the Pensions Act, and (2) that the plaintiff has no right to a share in these items either as heir or as devisee.

Taking the first point, s. 4 of the Pensions Act enacts that no Civil Court shall entertain any suit relating to any pension or grant of money or land revenue conferred or made by the British or any former Government. Now, remembering that "an enactment of a character...which...deprives the subject of his right to resort to the ordinary Civil Courts of Justice for relief in certain cases, ought to be construed strictly, and the Court should not extend its operation further than the language of the Legislature requires" [*vide* the cases cited in *Balvant Ramchandra Natu* v. *Secretary of State* (1)] one would think that the proper construction of the section would confine its operation to a grant of land revenue only as opposed to a grant of land. This is the view taken in this Court in *Panchanadayyan* v. *Nilakandayyan* (2) where Turner, C. J., says:—

"That Act contemplates money payments to be received through the Collector or recovered from persons bound to pay revenue," and, therefore, the Act does not cover grants of lands revenue-free.

This is also the view taken by Batty and Russell, JJ., in *Balvant Ramchandra Natu* v. *Secretary of State* (1). They follow the decision in *Panchanadayyan* v. *Nilakandayyan* (2). They also refer with approval to *Kumara Tirumalai Naik* v. *Bangaru Tirumalai Sauri Naik* (3) where it is observed:

"It cannot be said that the giving of land free of revenue is a grant of land revenue."

Babaji Hari v. *Rajaram Ballal* (4) was

(1) 29 B. 480 at p. 490; 7 Bom. L. R. 497.
(2) 7 M. 191; 2 Ind. Dec. (N. S.) 718.
(3) 21 M. 310; 7 Ind. Dec. (N. S.) 575.
(4) 1 B. 75 at p. 81; 1 Ind. Dec. (N. S.) 50.

quoted as authority. The passage cited runs thus:

"The land revenue arising from a man's own holding, when it is remitted, and the land pays nothing, is rather extinguished than granted."

I agree with these cases.

The appellant relies on two decisions, *Rama* v. *Subba* (5) and *Muthu Sri Jiejamba Bai Sahib* v. *Secretary of State* (6). It may be that in the former case it is possible to arrive at the conclusion that on a construction of the grant, there is a distinct grant of the land revenue apart from the land though there was also a grant of the land. It may be that in such cases the Act applies but if anything more was intended to be laid down in *Rama* v. *Subba* (5), I am not able to agree with it especially as my view is in consonance with the trend of later decisions of this Court. The second decision relied on by the appellant, *Muthu Sri Jiejamba Bai Sahib* v. *Secretary of State* (6), was a decision of Benson and Sundara Iyer, JJ. Sundara Iyer, J., afterwards explained it in *Secretary of State* v. *Ikurti Subrayudu* (7) and it is authoritative only in the light of that explanation. In the latter case it was observed:—

"The plaintiffs alleged that the land itself is *manyam* and this position was not contested by any of the defendants. The suit is, therefore, not one relating to any grant of land revenue."

Referring to *Muthu Sri Jiejamba Bai Sahib* v. *Secretary of State* (6) it was said:—

"The instrument of grant, it was held, distinctly made a grant of the taxes due to the Government although it may have been that the *kudivaram* also was granted. The grant of the *kudivaram* and *melvaram* was regarded as distinct and several....The *ratio* of the decision was,...that, where the Court is able to hold that there is a distinct grant of the land revenue itself, a suit relating to it is not within the cognizance of Civil Courts except with the sanction of the Collector."

I also agree that where there is a distinct grant of the land revenue even though the land is also granted the Act applies. But I am not to be taken as holding that the decisions in *Rama* v. *Subba* (5) and *Muthu Sri Jiejamba Bai Sahib* v. *Secretary of State* (6) are correct as to the construction of the grants in those cases. That point does not arise in this case. All that I can now say is, if the construction of the grants in those cases is right, I agree with the principle of law applied. The position of the words "land revenue" next to the words "pension or grant of money," I think, also supports this view. There is only one other decision of this Court to which I shall refer; it is *Nanjundiah* v. *Venkatasubbayya* (8) where it was held that the Pensions Act does not apply to a claim among the members of the family for partition but I shall not commit myself to the preceding sentence, "These observations are of great value in considering the right of an alienee to recover possession of an *inam*." The actual decision is that the Act did not apply. I, therefore, hold in this case that the Pensions Act is not a bar to the maintainability of the suit. I may add that the decision in *Panchanadayyan* v. *Nilakandayyan* (2) arose in connection with this very family. *Venkatarama Aiyar* v. *Chandrasekara Aiyar* (9) is another decision relating to the same family. The last decision leads me to the second point.

Mr. Krishnaswami Iyer argues for the appellant that under terms of the Inam Settlement (*vide* Ex. V which is the Inam Register), the land was confirmed under r. 5, cl. 3 of the Inam Rules of 11th October, 1859. But this was not agreed and it was ultimately confirmed under r. 5, cl. 1. Sub-clause (1) of cl. 1 of r. 5 says that succession is limited to direct lineal heirs. As the widow cannot succeed as an heir, it is argued that the plaintiff cannot succeed as she claims under a Will of her husband which is an alienation within the meaning of cl. 3. Now the object of cl. 3 is to protect the interests of Government and the prohibition therein can only mean that, as against the Government, all alienations are inoperative, not that they are void. So long as Government do not step in to enforce their rights, whatever they are, by ignoring the alienation, I do not think it is open to others to question a

(5) 12 M. 98; 13 Ind. Jur. 100; 4 Ind. Dec. (N. S.) 417.

(6) 15 Ind. Cas. 871; 23 M. L. J. 687; 12 M. L. T. 541; (1913) M. W. N. 255.

(7) 16 Ind. Cas. 18; 36 M. 559; (1912) M. W. N. 807; 12 M. L. T. 266; 23 M. L. J. 728.

(8) 26 Ind. Cas. 87; 27 M. L. J. 618; 1 L. W. 670; 16 M. L. T. 239.

(9) 62 Ind. Cas. 625; 44 M. 632; 40 M. L. J 344; 13 L. W. 383; (1921) M. W. N. 204.

transaction which amounts to alienation. This is the view taken in *Venkatarama Aiyar* v. *Chandrasekara Aiyar* (9) also in *Boyanapalli Venugopala Row* v. *Pothapalli Venkata Narasimha Row* (10) and *Dinvalu Lakshmipat* v. *Pingali Narasimham* (11). I agree with all these decisions. The appellant refers to *Subhan Ali* v. *Imami Begum* (12) but I do not think that case has any application here. I agree with the respondent's contention that so long as lineal heirs of the grantee remain, the Government has no right to resume and the property descends like ordinary property. This is not a case in which a special rule of succession is laid down for each individual holder of his share of the *inam*. It may also be pointed out that from 1904 up to 1917 the plaintiff has been allowed by the other members of the family to be in possession of her husband's share by receipt of the corresponding income and the appellants before us themselves recognized her right. Exhibit 14 is a lease taken by the 9th defendant in favour of himself, the plaintiff and Jagadesa Iyer, father of defendants Nos. 4 to 8. His explanation that the document so taken was all arranged by the 1st defendant, cannot be accepted. It appears from the registration endorsement that the document was delivered to the 9th defendant though he does not now choose to produce the original and produces only the registration copy. The plaintiff having been recognized to be the owner of her husband's share for more than twelve years claiming under her husband's Will, she has acquired title by prescription against the other sharers who also seem to be estopped from denying her title. The second point also fails.

The result is, the appeal is dismissed with costs of the plaintiff.

In the appeal, some grounds were taken against the 11th defendant's decree, but the appellant has not paid any Court-fee in respect of it and it is dismissed with proportionate costs of the 11th defendant, Pleader's fees being calculated on the proportionate shares of the 11th defendant in the Items Nos. 1, 4, 6, 7 and 8.

The 11th defendant has filed a memorandum of objections claiming profits subsequent to the institution of the suit. It is conceded by the appellants that he is entitled to it and the omission is probably the result of a slip. The memorandum of objections will be allowed but there will be no order as to costs. The other parties will pay their own costs.

Spencer, J.—I agree. In *Rama* v. *Subba* (5) the underlying policy of Regulation IV of 1831, which was repealed by the Pensions Act (XXIII of 1871), is stated to have been to protect the reversionary interest of the Crown over grants of revenue. The Pensions Act consolidated the law on the subject of pensions and grants of revenue. In ss. 4 to 6 it re-enacted the provisions of the Regulation which it had repealed with reference to unenfranchised *inams*. Thus the same policy was continued in the Act which is now in force. Government have in fact by various enactments constituted themselves the sole and final arbiters of all questions relating to the validity and sufficiency of grants of money or land revenue as well as those relating to the personality of the recipient and Government's own right to resume grants once given. Similarly by s. 58 of Madras Act II of 1864 they took away the power of Civil Courts to adjudicate as to rates of land revenue payable to Government. Seeing that the learned Judges who decided *Rama* v. *Subba* (5) expressly stated that the grant concerned in the suit that was before them was not a grant of the free-hold in the soil, and seeing that the object of that suit was in effect to challenge the decision of the Government who accepted the recommendation of the Board of Revenue and the Collector as to the person who should be recognised as the representative of the grantee of the *jagir*; I am of opinion that, that case should not be treated as an authority against the maintainability of the present suit for partition of plaintiff's share in certain unenfranchised personal *inams* belonging to her husband's family and devised to her by his Will.

In *Muthu Sri Jiejamba Bai Sahib* v. *Secretary of State* (6) the suit was brought by one of the Ranees of the Tanjore family against the Government itself to have it declared that Government had acted illegally in resuming a certain *inam* village. This decision clearly stated that the suit related to a grant of land revenue and land revenue only. In the suit out of which

(10) 12 Ind. Cas. 548; (1911) 2 M. W. N. 384.
(11) 34 Ind. Cas. 898; 3 L. W. 590; (1916) 1 M. W. N. 473.
(12) 88 Ind. Cas. 347; 52 C. 971 at p. 977; 23 A. L. J. 667; A. I. R. 1925 P. C. 184; (1925) M. W. N. 535; 21 N. L. R. 117; 30 C. W. N. 122; 50 M. L. J. 136; 52 I. A. 294 (P. C.).

the present appeal arises, there is no question as to the grant of land revenue but only a question whether the plaintiff is entitled to a share in the free-hold interest in certain unenfranchised personal *inam* lands. The jurisdiction of the Civil Courts to decide such a point is not ousted by anything in the Pensions Act. On the other point I have nothing to add to my learned brother's judgment. The appeal fails and is dismissed with costs of plaintiff. The appeal is also dismissed as against 11th defendant with costs proportionate as stated in my learned brother's judgment. The 11th defendant's memo. of objections is allowed but without costs. The other parties will bear their own costs.

This appeal having been posted to be spoken to this day, the Court (Ramesam and Curgenven, JJ.) delivered the following

JUDGMENT.—The mesne profits decreed in favour of plaintiff and 11th defendant will be ascertained by the Court below and a supplemental final decree will be passed. No part of the mesne profits is to be left to be determined in execution as was originally directed by the Court below.

Appeal dismissed.

V. N. V. *Memo. of objections allowed.*

ALLAHABAD HIGH COURT.

EXECUTION FIRST APPEAL No. 236 OF 1926.

October 25, 1926.

Present:—Mr. Justice Iqbal Ahmad.

ALIMUDDIN AND OTHERS—JUDGMENT-DEBTORS—APPELLANTS

versus

GOBIND PRASAD—DECREE-HOLDER—RESPONDENT.

C. P. C. (Act V of 1908), s. 47, O. XXI, r. 66—Execution of decree—Estimate of value of property to be sold—Appeal, whether lies.

An order passed in the course of execution proceedings in order to be appealable must be of such a nature as to come within the definition of the word "decree" as defined by s. 2 (2) of the C. P. C., that is to say, it must conclusively determine the rights and liabilities of the parties with reference to the reliefs granted by the decree. [p. 456, col. 1.]

An estimate of the value of property proposed to be sold in execution, made by the Court for the purpose of being inserted in the sale proclamation is not an adjudication of a nature that is binding on the parties to the execution proceedings inasmuch as a proceeding held under O. XXI, r. 66, of the C. P. C. is of an administrative nature and is not a judicial proceeding. [p. 456, col. 1.]

No appeal lies against an order fixing the estimated value of property sought to be sold in proceedings under O. XXI, r. 66 of the C. P. C. [p. 456, col. 2.]

Execution first appeal against a decree of the Subordinate Judge, Badaun, dated the 27th of March, 1926.

Mr. *Mushtaq Ahmad*, for the Appellants.

Mr. *Harnandan Prasad*, for the Respondent.

JUDGMENT.—This is an execution first appeal by the judgment-debtor and is directed against an order made by the Court below by which the value of the property directed to be sold has been assessed at a certain figure for the purpose of being inserted in the sale proclamation that is to be drawn up in pursuance of the provisions of O. XXI, r. 66 of tne C. P. C.

A preliminary objection has been taken to the hearing of the appeal on behalf of the respondent that no appeal lies as the order complained of does not amount to a decree within the meaning of ss. 2 and 47 of the C. P. C., and is not one for which an appeal is provided under O. XLIII, of the First Schedule to the Code. In support of this objection reliance has been placed on the case of *Ajodhia Prasad* v. *Gopi Nath* (1).

The learned Counsel for the appellants maintains that the order is one that comes within the purview of s. 47 of the C. P. C, and as such, an appeal lies against that order and he has placed reliance on the case of *Shiam Lal* v. *Roshan Lal* (2). In my opinion the preliminary objection is well-founded and must prevail. No doubt the words of s. 47 of the C. P. C. are very wide and as was pointed out in the case of *Mukhtar Ahmad* v. *Muqarrab Husain* (3) "if taken in their literal sense will cover every order of an interlocutory nature that may be passed in execution proceedings. But that does not seem to have been the intention of the Legislature." The order to be appealable as a decree must conclusively determine the rights and liabilities of the parties with reference to the reliefs granted by the decree. If any other view were adopted, the result would be that the proceedings in execution could be arrested at every stage by an appeal on behalf of the judgment-debtor against every order in the course of the execution proceedings. Obviously this could not have been the intention of the Legislature in enacting s. 47 of the Code. Every order passed in the course of the execution proceedings may,

(1) 39 Ind. Cas. 578; 39 A. 415; 15 A. L. J. 337.
(2) 35 Ind. Cas. 230; 14 A. L. J. 363.
(3) 15 Ind. Cas. 50; 34 A. 530; 10 A. L. J. 56.

in one sense, be characterised as an order relating to the "execution, satisfaction and discharge of the decree," but in order to be appealable, it must be of such a nature as to come within the word decree as defined by s. 2 (2) of the Code. This was the view held by this Court in the case reported as *Husani Bhai* v. *Bellie Shah Gilani Shah* (4).

As has been pointed out in the case of *Ajodhia Prosad* v. *Gopi Nath* (1) "the proceedings held under O. XXI, r. 66 are of an administrative nature and are not judicial proceedings." In other words the estimate of the value of the property made by the Court for the purpose of being inserted in the sale proclamation is not an adjudication of a nature that is binding on the parties to the execution proceeding. The judgment-debtor, if he makes an application under O. XLI, r. 90 of the C. P. C. for setting aside the sale is perfectly at liberty to assail the correctness of the estimate, for the simple reason, that the order, fixing the value of the property in proceedings under O. XXI, r. 66 does not involve an adjudication of the properties. *Vide Tota Ram* v. *Gouri Shankar* (5).

The contention of the learned Counsel for the respondent that no appeal lies against the order assessing the value of the property in proceedings under O. XXI, r. 66 is borne out by the decision in *Sivagami Achi* v. *Subramania Ayyar* (6) and in *Deokinandan Singh* v. *Bansi Singh* (7) and by the case of *Ajodhia Prasad* v. *Gopi Nath* (1). The case last mentioned is a Division Bench case of this Court and is binding on me.

The case of *Shiam Lal* v. *Roshan Lal* (2) on which reliance has been placed by the learned Counsel for the respondent, is, no doubt, a case decided by a Bench of two Judges, one of whom was a party, to that decision, did not decide as to whether or not an order of this nature is or is not appealable, but the other learned Judge seems to have been of opinion that the order was appealable, but he guarded his observations by the remark that he did not mean to lay down any general principle of universal application and that his decision was confined to the particular circumstances of the case which he was then deciding. The weight of authority is decided in favour of the view that no appeal lies against an order fixing the estimated value of the property sought to be sold in proceedings under O. XXI, r. 66 of the C. P. C., and I so decide. Accordingly I allow the preliminary objection and dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

(4) 83 Ind. Cas. 1035; 46 A. 733; 22 A. L. J. 706; A. I. R. 1924 All. 808; L. R. 5 A. 482 Civ.

(5) 78 Ind. Cas. 582; A. I. R. 1924 All. 480; L. R. 5 A. 218 Civ.

(6) 27 M. 259; 14 M. L. J. 57.

(7) 10 Ind. Cas. 371; 16 C. W. N. 124; 14 C. L. J. 35.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 124 OF 1924.

September 24, 1926.

Present:—Mr. Justice Odgers and Mr. Justice Curgenven.

MAHABOOB SIR PRAJUVANTHU *Sree Rajah* PARTHASARADHI APPA RAO SAVAJI ASWA RAO BAHADUR ZEMINDAR GARU—PLAINTIFF—APPELLANT

versus

TURLAPATI SUBBA RAO AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 89—Principal and agent—Pleader, employment of, in several cases—Suit by client against legal representative of deceased Pleader for moneys not accounted for—Limitation—Fresh cause of action, whether arises on Pleader's death against legal representative—Mutual, open and current account.

Where on the death of a Pleader who had been employed by a *zemindar* to conduct certain summary suits for him, the *zemindar* sued his legal representative for recovery of amounts received by the Pleader and not accounted for by him:

Held, (1) that the death of the Pleader did not give rise to a fresh cause of action against his legal representative; [p. 457, col. 2.]

Arunachalam Chetty v. *Raman Chetty* (8), followed.

Kumeda Charan Bala v. *Asutosh Chattopadhya* (2) and *Bindraban Behari* v. *Jamuna Kunwar* (4), dissented from.

(2) that the employment of the Pleader to conduct a number of cases did not constitute any general agency; [p. 458, col. 2.]

(3) that the contract of agency terminated with the termination of each suit for which a separate *vakalat* was filed and time began to run on such termination in respect of moneys paid for each particular suit; [*ibid.*]

(4) that there was no mutual, open and current account under Art. 89, Limitation Act. [p. 451, col. 2.]

Letters Patent Appeal against the judgment of Mr. Justice Phillips, dated the 2nd April, 1924, in S. A. No. 96 of 1923, and printed in 84 Ind. Cas. 276, preferred against a decree of the Court of the Subordinate Judge, Kistna, at Ellore, in A.

S. No. 65 of 1922, preferred against a decree of the Court of the Additional District Munsif, Ellore, in O. S. No. 202 of 1921.

Mr. *P. Chenchiah*, for the Appellant.

Mr. *S. Varadachariar*, for the Respondents.

JUDGMENT.

Odgers, J.—In this case the plaintiff, a *zemindar*, sued the legal representatives of a Pleader who was employed to conduct certain summary suits, etc., in Bhimavaram for the plaintiff asking for a decree for about Rs. 1,800 being the amount due from the deceased Pleader to the *zemindar* on account of money received and not accounted for by him. Now the Subordinate Judge after calling for findings as to what suits the Pleader had appeared in and when those were disposed of, held that only 22 suits were disposed of before the institution of this suit, and the most important point perhaps urged by Mr. Chenchiah for the appellant in Letters Patent Appeal from the judgment of my brother Phillips (who dismissed the second appeal) is the point of limitation. Mr. Chenchiah urges the following points: Firstly, that there was a general agency, that is to say, that the Pleader was what is sometimes called a "standing Vakil" to the *zemindar* and, therefore, his agency must be taken to have extended from 1916 when he was first engaged to his death in March, 1918. Now this contention was not only negatived by my brother Phillips but by the Subordinate Judge also, chiefly on the authority of the case reported as *Saffron Walden Second Benefit Building Society* v. *Rayner* (1) where the Lords Justices held that there was no such thing as an office of a solicitor and Lord Justice James points out that a solicitor is a man's solicitor "when he chooses to employ him and in the matter in which he is so employed." Lord Justice Bramwell says that

"A man is a solicitor for another when that other has occasion to employ him as such."

It is, of course, not disputed that in our practice the Pleader has to file a separate *vakalat* for every suit that he institutes on behalf of his client. And that was so in the present course of employment; a separate *vakalat* being also filed by the Pleader in each execution proceedings (Ex R.) so that in my opinion this contention must be negatived.

Then it was contended that even if his agency was not general, his accounts were, that is to say, that the Pleader maintained an open current account with the client and that the account instead of being closed as each suit was disposed of, simply ran on in the ordinary way, familiar to us, as payments by the employer and drawings against those payments by the Pleader. Now that really is a pure matter of surmise because the only accounts that we have in evidence are contained in Ex. R which, in my opinion, negatives any such idea. There the suits are kept separate, the expenses for each execution petition are set out and there is no ground for saying on such accounts as we have, that there was anything in the nature of an open running account between the client and his Pleader.

Now, then with regard to limitation, Mr. Chenchiah strongly contended before us that there was a liability to account outstanding at the death of the Pleader when the agency terminated and that, therefore, every item of account within 3 years from the date of the death of the Pleader must be taken into account in this suit. He argued that a new cause of action arises as against the legal representatives and that, therefore, he is entitled to reckon 3 years, not from the date of the suit but from the date of the termination of the agency. Now in support of this proposition we have been referred to *Kumeda Charan Bala* v. *Asutosh Chattopadhya* (2), *Kali Krishna Pal Chowdhry* v. *Srimati Jagattara* (3) and *Bindraban Behari* v. *Jamuna Kunwar* (4). It is noteworthy that no Madras case has been cited, although one is to be found in *Natesayyan* v. *Ponnusami* (5) to this effect. In fact our law as laid down in Madras is in favour of the opposite view. *Natesayyan* v. *Ponnusami* (5) has been overruled in *Malicsam Naidu* v. *Jugala Panda* (6), the view which is also supported by *Periasami Mudaliar* v. *Seetharama Cheltiar* (7), and there is direct authority in *Aruna-*

(1) (1880) 14 Ch. D. 406; 49 L. J. Ch. 465; 43 L. T. 3; 28 W. R. 681.

(2) 16 Ind. Cas. 742; 17 C. W. N. 5; 16 C. L. J. 282.

(3) 2 B. L. R. A. C. J. 139; 11 W. R. 76; 1 Ind. Dec. (N. S.) 741.

(4) 25 A. 55; A. W. N. (1902) 191.

(5) 16 M. 99; 3 M. L. J. 1; 5 Ind. Dec. (N. S.) 776.

(6) 23 M. 292; 8 Ind. Dec. (N. S.) 606 (F. B.).

(7) 27 M. 243; 14 M. L. J. 84 (F. B.).

chalam Chetty v. *Raman Chetty* (8). Mr. Chenchiah tried to distinguish this case on the ground that there the suit was barred when instituted being more than 3 years after the death of the agent and, therefore, could not apply to the principle for which he was contending. But the judgments clearly show that the agent died in April 1919 and the suit was brought in December the same year. The learned Judge held that there was no separate cause of action as against the sons, that is to say, the action against the sons is not different from that against the father and as it was barred against the father, after his life it was also barred against the sons.

Mr. Justice Spencer in his judgment in that case distinctly says that *Natesayyan* v. *Ponnusami* (5) has been overruled by the two later Madras cases referred to above and that the matter falls under Art. 89 of the Limitation Act. It was faintly suggested on the authority of the case in *Kumeda Charan Bala* v. *Asutosh Chattopadhyaya* (2), that as legal representatives are not mentioned in Art. 89, that Article can have no application to a suit like the present. That in my view is distinctly overruled by the case in *Arunachalam Chetty* v. *Raman Chetty* (8), and it is pointed out by Mr. Varadachariar that there are many Articles which would be reduced to absurdity if this contention were applied to them for instance Arts. 78 and 79. The column under which these Articles appear is headed "Description of suit." To my mind the omission of any mention of legal representatives in the word under "Description of suit" does not mean that the Article is not intended to apply to a suit against the legal representatives in order to let in Art. 120. It seems to me that in this case we ought to follow the decisions in *Arunachelam Chetty* v. *Raman Chetty* (8), *Mallesam Naidu* v. *Jugala Panda* (6) and *Periasami* v. *Seetharama Chettiar* (7), and no reason has been shown why any of these decisions should be held to be inapplicable to the present case. It seems to me, therefore, that the appeal fails on all the points put forward and must be dismissed with costs.

Curgenven, J.—The only issue we have to decide in this Letters Patent Appeal is that of limitation. The appeal is taken against the judgment of Phillips, J., in second appeal affirming the appellate judgment that such claims as would be barred against the Pleader himself are barred against his sons and legal representatives, the defendants.

I think there can be no doubt that a separate agency began and terminated with each suit or other proceeding. It is true that there is an order of appointment (Ex. B 2), under which the Pleader was to conduct the estate litigation, but it did not amount to a general power-of-attorney, and it has not even been suggested that it would of itself have given the Pleader authority to conduct the suits. That was furnished by the *vakalat* executed in each case, and it was the *vakalat*, therefore, that created the agency. It is then said that granting so much, the agency did not come to an end with the suit, but continued until the Pleader had accounted to his principal or had refused to account. Even assuming this to be so, it is acknowledged in the plaint that in some instances accounts had been rendered, and since there is no evidence on the record to show which cases these were, it is not possible to say, in any particular case, that account was not rendered. It must be taken, I think, that the agency in a given case came to an end with the case, and this assumption is the more permissible since we find that separate *vakalats* were executed for suits and for execution proceedings.

Thus, had the suit been against the Pleader himself, each proceeding he had taken under a separate *vakalat* would have furnished the basis for an account to be rendered, and time would have run from the date of termination of the proceeding. Would the rule of limitation be different, now that the father is dead and the suit is against the sons?

The answer to the question depends upon whether the sons were sued upon a cause of action different from that which was available against the father. In other words, did a fresh cause of action arise upon the father's death? The question, I think, is to be answered in the negative both upon general principles and upon authority. Suppose the father has been sued and had died pending suit. There is no doubt whatever, I suppose, that the sons could have been substituted for him as his legal representatives and the suit continued. This must surely mean that the cause of action survived he father's death, and was

(8) 27 Ind. Cas. 807; 16 M. L. T. 614; (1915) M. W. N. 23.

available also against the sons. A legal representative, so far as the assets come into his hands, carries on the liability of the deceased in all cases where that liability does not lapse with the death. Of the cases cited which appear to run counter to this doctrine, the only one in which the facts raise an issue strictly analogous to the present is *Bindraban Behari* v. *Jamuna Kunwar* (4). In that case it was not only held that a fresh cause of action arose, when, upon the death of the father, the money came into the defendant's hands but, further, that the suit against the son would not fall under Art. 89 of the Limitation Act because the suit was not against the agent but against his legal representative. With all respect, I must dissent from both propositions—against the latter it has only to be pointed out that the Limitation Act classifies suits according to their 'description' and that a suit of the description referred to in Art. 89 may be brought against the legal representative of an agent as well as against the agent himself, just as under Art. 78 the drawer's representatives may be sued upon a dishonoured Bill of Exchange. Against the doctrine that receipt of the money by the son creates a fresh cause of action, the Madras case relied upon by the learned Judge *Arunachalam Chetty* v. *Raman Chetty* (8) appears to me to be clear authority from which I can see no reason to differ.

It may be, as was admitted in *Venkatacharyulu* v. *Mohana Panda* (9), that the onus and methods of proof may differ when the suit is against a legal representative, and it may even be that the remedy would be different in kind; but those are no reasons for holding, that a fresh cause of action arose when the assets liable for the claim came into the defendants' hands upon their father's death.

I agree, therefore, that this appeal must be dismissed with costs.

V. N. V. *Appeal dismissed.*

(9) 61 Ind. Cas. 530; 44 M. 214; 12 L. W. 390; (1920) M. W. N. 650; 39 M. L. J. 586.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 64 OF 1925.

May 6, 1926.

Present :—Mr. Justice Waller and Mr. Justice Madhavan Nair.

SANNADHI GUNDAYYA—APPELLANT

versus

ILLOORI SUBBAYYA AND OTHERS —RESPONDENTS.

Contract Act (IX of 1872), s. 56—Contract for delivery of rice by railway waggons--Government restrictions in respect of transport of rice—Inability to deliver on account of waggon shortage, effect of—Contract, whether conditional—Impossibility of performance.

Where the defendant agreed to supply a certain number of bags of rice to the plaintiff by railway waggons at a time when as a war measure, the Government had imposed waggon restrictions and priority certificates, the existence of which was known to both the parties, and owing to the shortage of waggons on account of the enforcement of the rules, the defendant was not able to perform his contract:

Held, (1) that the seller must be regarded as having agreed to supply the promised number of bags of rice only if after using his best endeavours he was able to secure the necessary number of waggons and that the obligation to perform the contract was not, therefore, absolute, but impliedly conditional on a sufficient number of waggons being secured for delivery; [p. 461, col. 1.]

In re Anglo-Russian Merchant Traders & Batt & Co. (1), followed.

(2) that as the defendant had not been able to secure a sufficient number of railway waggons for delivery of the rice, he was excused from performance of the contract under s. 56 of the Contract Act. [p. 460, col. 1.]

Letters Patent Appeal against the judgment of Mr. Justice Odgers, dated the 17th February, 1925, in Second Appeal No. 121 of 1924, preferred to the High Court against a decree of the District Court, Kurnool, in A. S. No. 128 of 1921, (O. S. No. 57 of 1920, on the file of the Court of the Subordinate Judge, Kurnool, in O. S. No. 17 of 1919, District Court, Kurnool).

Mr. *A. Krishnaswami Iyer* and *W. Kothandaramiah*, for the Appellant.

Mr. *K. V. Krishnaswami Iyer*, for the Respondents.

JUDGMENT.—This is an appeal under s. 15 of the Letters Patent against the judgment of Odgers, J. in S. A. No. 121 of 1924.

The facts of the case are simple and the findings are not disputed. The plaintiffs sued the defendant-appellant for damages for breach of contract to deliver certain bags of rice. The defendant had no license for importing rice but it is admitted that the parties knew that the defendant's friend "Ayyalu" had a license and that he would

enable the defendant by his good offices to perform the contract with the plaintiffs. It is not disputed that the contract contemplated delivery by railway waggons. As a war measure the Government had imposed "waggon restrictions", and "priority certificates" allover the Presidency, and this interfered with the free and easy transport of rice. The existence of these restrictions was well-known to all the parties. Owing to the shortage of waggons on account of the enforcement of the rules, the defendant was not able to perform his contract. He, therefore, pleaded impossibility of performance as a defence to the suit. Odgers, J., held in second appeal that, since the parties knew of the existence of these restrictions, it was not open to the defendant to import into the contract an implied condition that the contract was not to be performed if he was not able to secure to sufficient number of waggons for delivery.

The defendant-appellant relies on s. 56 of the Indian Contract Act. According to the 2nd para. of this section "a contract to do an act which, after the contract is made, becomes impossible..... ..becomes void, when the act becomes impossible....." "By the Common Law of England a man who promises without qualification is bound by the terms of his promise....If the parties do not mean their agreement to be unconditional, it is for them to qualify it by such conditions as they think fit" (Pollock and Mulla, page 318). The rigour of this absolute rule has been gradually and very considerably relaxed by the recognition of "the doctrine of the implied term" by which, on the ground of impossibility parties have been excused from performing their contracts by relying on conditions which may be implied from the nature of the contract and the surrounding circumstances. It does not appear as observed by Sir Frederick Pollock that the law embodied in s. 56 is materially divergent from the English doctrine.

In *In re Anglo-Russian Merchant Traders & Batt & Co.* (1) by a contract made in London 50 tons of aluminium had to be supplied to Vladivostok during a specified time. At the date of the contract, there was to the knowledge of both parties a prohibition against the export of aluminium from England except on license granted by the British Government. The sellers were unable to obtain a permit and the aluminium was not exported. The Court of Appeal held that the contract was discharged by the impossibility of performance. With reference to the argument that the seller's obligation, under the contract, was absolute, Viscount Reading, C. J., observed thus: "There was at the time of making the contract and at all material times a prohibition against the export of aluminium except under a license. If a license cannot be obtained aluminium cannot be shipped, and I cannot see why the law should imply an absolute obligation to do that which the law forbids. A shipment contrary to the prohibition would be illegal, and an absolute obligation to ship could not be enforced. I cannot agree that, in order to give to the contract its business efficacy, it is a necessary implication that the sellers undertook an absolute obligation to ship whether a license was or was not obtained." Scrutton, L. J., also used language to the same effect: "It is sufficient in order to give business efficacy to the contract to hold that no higher obligation can be implied than that the sellers would use reasonable diligence to get a license." The learned Judges refused to read the contract as imposing an obligation which would imply that the parties had undertaken to carry out an arrangement against law. They, therefore, held that the reasonable view of the contract in that case was that the sellers sold subject to their being able to ship under a license and that they impliedly undertook to use their best endeavours to obtain a license.

In our opinion the present case falls within the principle of the above ruling. It has been found that the defendant used his best endeavours to secure the waggons but failed. If we regard the obligation to deliver the bags of rice as absolute in spite of the waggon restrictions and priority rules enforced by Government it would imply that the seller had undertaken to perform a contract contrary to the rules enforced by the Government and hence illegal. The argument that the parties should have provided for the failure of performance in the contract itself and since that was not so done, the defaulting party should suffer cannot apply in a case like the present where the parties knew that owing to the restrictions introduced by Government rules, shortage of waggons may occur and performance for

(1) (1917) 2 K. B. 679; 86 L. J. K. B. 1360; 116 L. T. 805; 61 S. J. 591.

that reason may be rendered impossible. As pointed out by Viscount Reading, C. J., in *In re Anglo-Russian Merchant Traders & Batt & Co.* (1) so, in this case, we cannot see "why the law should imply an absolute obligation to do that which the law forbids." The learned Vakil for the appellant was not able to distinguish the present case from the case in *In re Anglo-Russain Merchant Traders & Batt & Co.* (1). In our opinion the reasonable view of the contract in this case is that the seller agreed to supply the promised number of bags of rice if after using his best endeavours he was able to secure the necessary number of waggons. The obligation to perform the contract was not, therefore, absolute, but impliedly conditional. In this view, we set aside the decision of the learned Judge and restore the decree of the trial Court The appellant will get the costs in the District Court and in the High Court.

V. N. V. *Appeal allowed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 16 OF 1926.

November 17, 1926.

Present:—Mr. Hallifax, A. J. C.

NARAIN AND OTHERS—DEFENDANTS—APPELLANTS

versus

MOTISA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Mayukha—*Ajmer, law applicable to—Woman taking absolute estate, origin of custom—Landlord and Tenant—Transfer of holding by Hindu widow—Landlord's consent, effect of.*

The Hindu Law prevailing in Ajmer in respect of the nature of the estate inherited by a woman is the Benares School and not the Bombay School. [p. 461, col. 2.]

Mayukha was not written till some time in the 17th century and though it is a record of pre-existing customs, it does not record the custom of a woman taking an absolute estate in property inherited from her father: that is a later interpretation of the work. [p. 462, col. 1.]

There is nothing to distinguish between the transfer of a tenancy with the consent of the landlord and a surrender to the landlord followed by a fresh grant of it to the transferee. [*ibid.*]

Appeal against a decree of the Subordinate Judge, No. 1, First Class, Wardha, dated the 20th October, 1925, in Civil Suit No. 7 of 1921.

Messrs. *V. R. Pandit*, R. B., and *M. R. Bobde*, for the Appellants.

Mr. *M. B. Niyogi*, for the Respondents.

JUDGMENT.—Very nearly the whole of the long argument addressed to the Court by the learned Counsel for the appellants was taken up with the contention that the plaintiffs and the defendants Narayan and Jani followed the Bombay School of Hindu Law and not the Benares School. That matter was finally settled by the judgment of this Court on the 29th of March, 1924, when the case was remanded for consideration of another point. The defendants were appellants in that case also and para. 6 of the judgment is as follows: "The fourth point is as regards the School of Hindu Law by which the parties to this suit are governed. It is argued that the Court ought to have ascertained this from the parties and need not have assumed that they were governed by the *lex loci*, namely, the Benares School. This point, which involves question of the original abode of the parties, is a question of fact and not being raised by the defendants-appellants at the stage of the trial, they cannot be allowed to urge it at the stage of appeal. I, therefore, disallow this objection to the decree of the lower Court." The evidence subsequently given on the point and the long discussion of it in the judgment of the lower Court now under appeal, as well as the disquisition on it in this Court based on extensive historical research, represent a deplorable waste of time, effort and money.

Even if the matter were open for discussion, the finding must be against the appellants. It is very clearly proved by the evidence that the plaintiffs and the defendants Narayan and Jani are descendants of Rao Rathor Telis who left their original home in Ajmer about 1500 A. D., and that they still observe the personal law which governed them in Ajmer. It is admitted that at present the Hindu Law in Ajmer in respect of the estate inherited by a woman from her father is the law of what is called the Benares School, not that in force in Bombay. The learned Counsel for the appellants has urged, however, that Ajmer at one time formed a part of the Kingdom of Gujerat, and that the Mayukha is the record of the custom in the whole of that Kingdom, as laid down by the Privy Council in *Lallubhai Bapubhai* v. *Mankuvarbai* (1).

(1) 2 B. 388; 1 Ind. Dec. (N. S.) 682 (F. B.).

But it was late in the 15th century that Ajmer was conquered from Gujerat, which is about the time at which the ancestors of the plaintiffs left it, and the Mayukha was not written till some time in the 17th century. The treatise is certainly a record of pre-existing custom, but, as was pointed out by Kanhaiya Lal, J., in *Jawahir Lal* v. *Jarau Lal* (2) it does not record the custom of a woman taking an absolute estate in property inherited from her father; that is a later interpretation of the work, of which the earliest record we have is in the judgment of the Bombay High Court delivered in 1859 in *Pranjivan Das* v. *Deo Kuar Bai* (3). It must be held, therefore, that Sita did not take an absolute estate in property inherited from her father.

But it is impossible to distinguish between a transfer of a tenancy with the consent of the landlord and a surrender of it to the landlord followed by a fresh grant of it to the transferee. The transaction is carried through in one step or by one deed instead of two, but it is the same transaction. It is further admitted that a surrender of the absolute occupancy tenancy by Sita to the landlord would be good against the reversionary heirs of her father. It is necessary, therefore, to examine the correctness of the finding of fact at which the lower Court arrived that the landlord did not consent to the transfer by Sita.

Sita, who died on the 19th of April, 1913, made the transfer on the 3rd of September, 1909, by a deed of gift which was duly registered. In 1909-10, the agricultural year then current, the names of Jani and Narayan were recorded in the *jamabandi* as the tenants, and this continued after Sita's death. In 1912 Jani and Narayan sued Sita and the *malguzar* Shankarlal for a declaration that a mortgage of the holding executed by Sita was not binding on them because there was no legal necessity for taking the loan.

In that suit Shankarlal pleaded: "This defendant does not admit the validity or execution of the alleged deed of gift in plaintiffs' favour. Even if the deed of gift is valid, the plaintiffs' deed of gift being subsequent to the mortgage, they can at the most bring a suit for the redemption of the mortgage and not for repudiation of the same." In a further oral statement made by Shankarlal's Pleader it was said: "Sita was in possession and still is in possession of the property." Eventually, after the death of Sita in April, 1913, the suit was withdrawn with permission to sue again on the same cause of action.

To hold that Shankarlal's pleadings in that suit even tend to show that he did not consent to the gift, is to hold that people of his class do not ordinarily deny what they know to be the truth in their pleadings when they think some advantage is to be got by doing so. It is also to be noticed that Shankarlal did not deny even "the validity or execution" of the deed, but only refused to admit them. As to his consent, there is not only no denial of that but not even a formal refusal to admit it. If the pleadings are read carefully and as a whole, they amount really more to an admission than to a denial of even the execution and validity of the deed of gift.

In 1919 Shankarlal as *Lambardar* brought a suit for the rent of the holding for the previous seven years, that is, from 1912-13 the year in which Sita died, claiming also a charge on the holding for the amount in arrears. He made Narayan and Jani and also two of the three present plaintiffs defendants to that suit. The third paragraph of the plaint is as follows: "Sita died on 19th April, 1913. During her life Narayan and Jani lived with her and she executed a deed of gift in their favour. Accordingly at first Narayan's name was recorded against the fields and in 1914-15 the names of both Narayan and Jani, which has continued up to the present. Those two appear from the *Patwari's* papers to be the tenants of the fields, and they say themselves they are. But, correctly regarded, from the genealogy filed in the case, Tanba and Moti appear to be the legal reversionary heirs of Gajmal after the death of Sita and that is what they assert, saying that the deed of gift executed by Sita is illegal and void against them."

The greatly condensed form of this passage in the judgment of the lower Court is as follows: "Sita executed a gift in her lifetime. At first the name of defendant No. 1 (Narain) and then *i.e.*, from 1324 (*Fasli*) year the names of defendants Nos. 1 and 2 (Narayan and Jani) are shown against fields Nos. 10 and 11 till to-day. Thus defendants Nos. 1 and 2 appear to be the tenants.....and such is also their case. But

(2) 79 Ind. Cas. 861; 22 A. L. J. 49; 46 A. 192; A. I. R. 1924 All. 350; L. R. 5 A. 130 Civ.
(3) 1 B. H. C. R. 130.

really.....Tanba.....and Moti .....as reversioners appear to be legal heirs and such is their statement." The last sentence is hardly a correct rendering of the effect of the words of the plaint. Indeed the statement that Narayan and Jani had been in possession as tenants and had been so recorded for many years after the execution of the deed of gift is a fairly clear admission of consent to the transfer, and the plaintiffs were joined only because they claimed to be the tenants as the heirs of Gajmal.

The third suit of which the facts have been regarded as disproof of the *Lambardar* having consented to the gift of the tenancy was also filed by him in 1919. He sued for foreclosure of the mortgage which had been attacked in the abortive suit of 1912, and joined the plaintiffs as well as Narayan and Jani. As in the case of the suit for rent, if the joining of the plaintiffs in the mortgage suit could be regarded as a denial of the rights of Narayan and Jani, the joining of the latter must also be regarded as a denial of the rights of the plaintiffs.

The rest of the evidence of the *Lambardar's* consent having been given consists mainly of his own affirmation as a witness that it was, and the fact that from the date of the gift and during the remaining three years of Sita's lifetime the transferees were recorded and treated as the tenants of the holding, nothing more seems to be required. That fact would certainly be regarded as sufficient proof of the consent in a suit between the transferees and the *Lambardar* in which he denied it, and it is, therefore, sufficient here even if his testimony is considered to be worthless. It is found, therefore, that the *Lambardar* did consent to the transfer of the tenancy by Sita to Narayan and Jani.

A minor matter that has been left out of sight all through the case is that the deed of gift covers house property as well as the absolute occupancy holding; the landlord's consent could not validate the transfer of that. As, however, the houses are presumably in the *abadi* of the village, Sita's transfer of the license to occupy the site could certainly not be questioned by the reversioners, and it is safe to assume that they consider it not worth their while to question her transfer of the materials. Anyhow the transfer of the houses has been treated all through the case as valid or invalid along with that of the holding, and it is too late to treat it differently now The decree of the lower Court will accordingly be set aside and in its place a decree will issue dismissing the suit. The plaintiffs will pay all the costs of both parties in both Courts.

G. R. D. *Appeal allowed.*
A. N. A.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1719 OF 1926.
November 17, 1926.
Present:—Mr. Justice Coldstream.
KIRPA RAM—DEFENDANT—APPELLANT
versus
CHAND BAHADUR—PLAINTIFF—RESPONDENT.

Appeal--Point raised in ground of appeal not referred to in judgment—Presumption.

Where there is no reference in a judgment to a point raised in the grounds of appeal, it must be assumed that it was not brought to the notice of the Court but was given up. [p. 464, col. 1.]

Appeal against a decree of the Additional District Judge, Amritsar, dated the 13th May, 1926, modifying that of the Second Class Sub-Judge, Amritsar, dated the 4th November, 1925.

Mr. *Harbhajan Das*, for the Appellant.
Mr *Shamair Chand*, for the Respondent.

JUDGMENT.—On the 27th February, 1925, Kirpa Singh contracted to supply certain furniture to Chand Bahadur, who had himself contracted to supply it to the Amritsar Medical School. The articles were to be supplied by the 15th March, but an extension was given up to the 19th March. The defendant did not, however, supply the goods until the 20th April, and when he supplied them they were rejected by the Medical School authorities. On the 1st July, 1925, Chand Bahadur instituted a suit from which this appeal arises, against Kirpa Singh claiming Rs. 1,096-8-0 made up as follows :—

	Rs.	a.	p.
Purchases of Benches not supplied	307	0	0
Spent on repairs on other furniture	159	8	0
Spent on polishing furniture	20	0	0
Money advanced	610	0	0
Total ...	1,096	8	0

The defendant pleaded that the benches had not been supplied because the plaintiff had failed himself to furnish the defendant as he had undertaken to do with iron legs for them. As regards the other articles the defendant pleaded that they had been supplied in time and had been of proper quality.

The first Court decreed a sum of Rs. 786 8-0 being Rs. 486 spent on purchase of benches and repairs and Rs. 300 damages for the payment of which the contract provided. This amount was reduced to Rs. 566-8-0 on appeal by the Additional District Judge who allowed Rs. 466-8-0 on account of money actually spent and Rs. 100 only on account of damages. The defendant Kirpa Singh has filed this second appeal which has been argued before me by Mr. Harbhajan Das. The grounds urged by Mr. Harbhajan Das are, firstly, that the lower Appellate Court has omitted to deal with two questions raised by the grounds of appeal preferred before it, namely, whether the goods on which Rs. 159-8-0 are said to have been spent were those supplied by the defendant and whether the plaintiff had or had not failed to supply the iron legs for the benches, secondly, that the contract was between the plaintiff and the defendant and the lower Courts were wrong in holding that the defendant was bound to supply the goods to the satisfaction of the Medical School, and thirdly, that the evidence shows that the goods supplied were passed by the plaintiff as acceptable.

As regards the first contention I find that the judgment of the lower Appellate Court makes no reference to the points referred to in Mr. Harbhajan Das' final contention. It must be assumed that the matters were not brought to the notice of the lower Appellate Court but were given up. *Abdul Karim* v. *Thakar Ram Jaggu Ram* (1). I find, moreover, on perusing the evidence in the case that the first Court's findings upon them in favour of the plaintiff were justified. As regards the contention that the defendant had not contracted to supply the goods to the satisfaction of the Medical School authorities I agree with the findings of the lower Courts to the effect that the words in the contract Ex. P. 1 ("balance to be paid when goods are passed") were understood by the defendant to mean that the goods were to be passed as satisfactory not by the plaintiff but by the Medical School authorities. This is, in my opinion, clearly established by the evidence.

The defendant admitted that he did not supply the benches. I find it proved by Mr. Longman's evidence that the iron legs for the benches were duly furnished to the defendant. As regards the rest of the goods it is proved that they were supplied a month late and I find no justification for Mr. Harbhajan Das' arguments that they must have been accepted as satisfactory because the plaintiffs advanced Rs. 50 in part payment to the defendant on the 20th April. This disposes of all the grounds of appeal urged before me. The appeal is dismissed with costs.

R. L. *Appeal dismissed.*

(1) 68 Ind. Cas. 740; A. I. R. 1923 Lah. 124.

MADRAS HIGH COURT.
FULL BENCH.

CIVIL SUIT No. 720 OF 1925.

October 20, 1925.

Present:—Sir Victor Murray Coutts Trotter, KT., Chief Justice, Mr. Justice Krishnan and Mr. Justice Beasley.

Rajah INUGANTI VENKATARAYANIM VARU *alias* VENKATARAMAYYA GARU—PLAINTIFF

versus

W. H. NURSE—DEFENDANT.

Original Side Rules (Madras), O. VI (a), r. 62—Negotiable instruments, suits on—Option of party to sue in ordinary form—Suit by or against legal representative—Summary procedure.

Under r. 62 of O. VI (*a*) of the Original Side Rules of Practice of the Madras High Court a person suing on a negotiable instrument is bound to bring his suit under the summary procedure and not in the ordinary form inasmuch as r. 62 is mandatory and not directory. Likewise suits on negotiable instruments by or against legal representatives of parties can and must be brought only in the summary form. [p. 465, cols. 1 & 2.]

Case referred to a Full Bench in C. S. No. 720 of 1925, by Srinivasa Iyengar, J.

Mr. *N. Chandra Sekhara Iyer*, for the Plaintiff.

Messrs. *K. S. Narayana Iyengar* and *G. Rama Krishna Aiyar*, *Amicus Curiæ*.

JUDGMENT.—This reference has been necessitated by the judgment of Devadoss, J, in C. S. No. 877 of 1923 sitting on the Original Side of the High Court wherein the learned Judge held that under O. VI (*a*) of the High Court Rules of Practice

a person suing on a negotiable instrument had an option to bring his suit in the ordinary form or under the summary procedure as he liked, the rules in the Order, though in form peremptory being in reality only directory and not mandatory; and that a suit by or against the legal representative of a party to a negotiable instrument and not by or against a party himself should be brought as an ordinary suit and not as a summary suit.

On both the above points it seems to us with all respect that the learned Judge's views cannot be supported. Rule 62 of O. VI (*a*) says that the "procedure prescribed by O. XXXVII of the First Sch. of the C. P. C., 1908, shall be followed in all suits on negotiable instruments with the modifications mentioned in this Order."

Order XXXVII, C. P C, no doubt, gives an option to bring such a suit either in the summary form or in the ordinary form, for r. 2 (1) thereof says:

"All suits upon bills of exchange, *hundis* or promissory notes may, in case the plaintiff desires to proceed hereunder, be instituted etc."

Now it is in this very rule that O. VI (*a*) has introduced a modification: for r. 63 (*a*) thereof which corresponds to it has deleted the words "may, in case the plaintiff desires to proceed hereunder," which are the words giving the option and has substituted for them the word "shall." There can be no clearer indication than that of the object of the framers of the rules to take away the option and substitute for it a rigid rule requiring all suits on negotiable instruments to be brought in a summary manner. The form prescribed for the plaint under the rules, namely, form No. 4 in Appendix B, C. P. C., is a form adopted only for summary suits and not for ordinary suits. The intention underlying the High Court's rule was to expedite the disposal of all suits on negotiable instruments and the rule has had a salutary effect in that direction. The very object of the rule will be defeated if we are to hold that in spite of its language there is still an option left to a plaintiff suing on a negotiable instrument to bring his suit in the ordinary form. We hold there is no such option.

In this connection it may be mentioned that it was feebly suggested that on the view we are taking, the rule would have to be treated as *ultra vires* because it is said that it takes away the ordinary right of suit from a litigant suing upon a negotiable instrument. That may be the effect of the rule but the High Court which framed the rule has full powers to frame rules for regulating its procedure under cl. 37 of the Letters Patent under which this rule was framed; and the rule is purely one of procedure and does not affect any substantive rights of parties. This objection is, therefore, groundless.

The last question is whether suits on negotiable instruments brought not by or against parties to it but by or against their legal representatives are excluded from the scope of O. VI (*a*). On this point there is no difference between the rule under the C. P. C. and the one in O VI (*a*). They both refer to all suits on bills of exchange, *hundis* or promissory notes; there is no limitation that the suit should be by or against parties to the instrument. So long as the suit can be properly described as a suit on a bill of exchange, *hundi* or promissory note, it can be, and in the High Court it must be, brought in the summary form. A suit on a negotiable instrument by or against a legal representative is still a suit on the instrument and will fall under O. VI (*a*). It is only if any other cause of action is added not based on the instrument that the suit may fall outside the scope of the order; if the liability sought to be enforced is solely under the instrument it would not matter whether it is sought to be enforced against a party to the instrument or a legal representative of such a party such as an executor, or administrator, or heir of his. The English practice is in accordance with this view; there does not seem to be any proper reason to adopt a different rule here. Undoubtedly where summary suits are brought against executors, administrators, or other legal representatives who were not parties to the instrument, the rule as to granting leave to defendants will be liberally interpreted as the learned Judge observes. In such an action unconditional leave to defend will generally be given if the defendant has any reasonable ground for asking that the claim should be strictly proved. That removes any hardship that a legal representative defendant may be put to by the adoption of the summary procedure.

It is argued that summary procedure is not available where apart from the note sued on, other facts have to be proved to

make the defendant liable as no evidence is taken in such suits and *Remfry* v *Shillingford* (1) and *Bhupati Ram* v. *Surendra Mohun Tagore* (2) are cited in support of the contention. To meet the objection raised in these cases the law has been changed under the new Code of 1908 by adding to r. 2 (2) of O. XXXVII a provision which says that if leave to defend is not obtained "the allegations in the plaint shall be deemed to be admitted" making it unnecessary to prove them by evidence. The same rule applies under O. VI (*a*) for it adopts the rules of O. XXXVII unless modified by itself. These decisions are, therefore, of no force now.

We hold that suits on bills of exchange, *hundis* and promissory notes by or against legal representatives of parties can and must be brought in the High Court in the summary form.

The case will go back to the learned Judge on the Original Side for disposal. The costs of the reference will be costs in the cause.

V. N. V. *Case remanded.*

(1) 1 C. 130; 1 Ind. Dec. (N. S.) 84.
(2) 30 C. 446; 7 C. W. N. 412.

OUDH CHIEF COURT.

SECOND CIVIL APPEAL No. 516 OF 1925.
November 24, 1926.
Present:—Mr. Justice Misra.
BRAHMAJIT SINGH—PLAINTIFF—APPELLANT
versus
DWARKA SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 65—Redemption of mortgage—Suit for simple money-decree on deed of further charge—Cause of action—Limitation.

The cause of action for a simple money-decree on the basis of a deed of further charge arises under Art. 65 of the Limitation Act from the time when the mortgage is redeemed. [p. 467, col. 2; p. 468, col. 1.]

Lal Behari v. *Satgur Prasad* (1), followed.

Appeal against a decree of the Subordinate Judge, Sultanpur, dated the 16th September, 1925, setting aside that of the Munsif, Amethi at Sultanpur, dated the 1st January, 1925.

Mr. *Naimullah*, for the Appellant.

Mr. *Rudra Datta Sinha*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for recovery of money due under a deed alleged to be a deed of further charge, dated the 9th September, 1912. On the 30th July, 1892, one Zabar Singh executed two deeds of mortgage each for Rs. 750, one in favour of Tulshi Singh (father of Rambali Singh, the plaintiff) and Dilas Singh, and the other in favour of Sugrim Singh. The mortgages were with possession. A deed of further charge was executed for Rs. 150 on the 11th February, 1897, but we are not concerned with that deed in the present suit. Subsequently the deed in suit was executed by Rachhpal Singh, son of Zabar Singh for Rs. 50 in favour of Rambali Singh. In 1923 Mathura Singh nephew of Zabar Singh, and Muttu Singh, son of Ghirao Singh another son of Zabar Singh, claimed redemption of the property mortgaged under the deeds, dated the 30th July, 1892. The plaintiff, Rambali Singh, was impleaded as a defendant in that suit and he set up his claim for money due under the deed in suit before Mathura Singh and Muttu Singh could be allowed to redeem These facts would appear from the plaint and the written statement of that suit filed in this case as Exs. 2 and 3. On the 31st January, 1924, a compromise was arrived at between the parties to that redemption suit and a decree was passed on the basis of the said compromise (*vide* Exs. 5 and 4). Under the terms of the compromise Mathura Singh and Muttu Singh were allowed to redeem the mortgaged property on a condition embodied therein that the defendants, among whom Rambali Singh was one, could seek relief for obtaining their money due under either deeds by a separate suit. It was stated that the plaintiffs were not liable to pay the money due under those deeds obviously on the ground that they were not executants of those deeds. Rambali Singh thereafter instituted the present suit for recovery of the money due under the deed dated the 9th September, 1912, on the 5th of November, 1924. The defendants impleaded in the suit were Nandan Singh, son of Rachhpal Singh and Nasib Singh, son of Sheoratan Singh, the person in whose favour the deed in suit had been executed along with the plaintiff Rambali Singh. The plaintiff claimed only half the money due under the deed in suit.

The defence raised by Nandan Singh consisted of two pleas: one that the deed in suit

was neither genuine nor valid; and the other that the plaintiff's suit was barred by limitation.

The learned Munsif of Amethi at Sultanpur, who tried the suit, found the deed to be genuine and valid and the plaintiff's suit well within limitation. On these findings he decreed the plaintiff's suit against Nandan Singh.

On appeal the learned Subordinate Judge of Sultanpur agreed with the finding of the learned Munsif as to genuineness and the validity of the deed but differed from him as to the plea of limitation, and, therefore, dismissed the plaintiff's claim as being barred by limitation.

The plaintiff, Rambali Singh, came to this Court in second appeal, but during the pendency of the appeal he has died and the name of his minor son, Brahmajit Singh under the guardianship of his uncle Ram Raj Singh, has been substituted in place of his. One of the defendants, Nandan Singh, has also died during the pendency of the appeal and his four sons, namely, Dwarka Singh, Basu Singh, Bhagauti Singh and Deota Din Singh have been brought on the record in his place. Dwarka Singh has appeared before this Court and is represented by Counsel. The other brothers of Dwarka Singh have not appeared and I have held in my order of to-day's date that inasmuch as Dwarka Singh is living jointly with his three other brothers and is the head of the family, the other brothers who have also been impleaded as respondents in the case will be considered as sufficiently represented by him and the decision of this appeal will be binding on them.

It is argued by the learned Pleader for the appellant that the finding of the learned Subordinate Judge on the point of limitation is incorrect and that the plaintiff's suit is amply well within limitation. After hearing the arguments of both the parties in this appeal I have come to the conclusion that the appeal must be decreed. It appears to me that the time fixed for payment under the deed, dated the 9th September, 1912, was when the mortgage of the 30th July, 1892, was to be redeemed. The deed in suit clearly provides that without the payment of money due under it the mortgagor will not be entitled to redeem the property mortgaged under the deed dated the 30th July 1892. The deed is also described as a deed of "*kumki*" or "*zar mazid*" that is, a deed of further charge. These points clearly indicate that the money was contemplated by the parties to be paid at the time of redemption. The learned Pleader for the respondents contended that there was no time whatever fixed for payment in the deed and the money could have been paid by the mortgagor at any time that he liked. We are not concerned with the question whether the mortgagor could have paid the money whenever he liked to pay; what we are concerned with is whether the mortgagee could have enforced the payment of the deed at any time that he liked. On this point I am clearly of opinion that the mortgagee could claim the money due under this deed only at the time of redemption; otherwise there was no point in calling this deed to be a deed by way of "*zar mazid*." If, therefore, the mortgagee could not claim the money before the redemption of the principal mortgage, dated the 30th July, 18 2, the cause of action could not have arisen in favour of the plaintiff prior to redemption which was, as stated above, effected by the compromise, dated the 31st January, 1921. The present suit was brought on the 5th November, 1924, within a year of the date when the redemption was effected.

Under Art. 65 of the First Sch. to the Indian Limitation Act (IX of 1908) the period of limitation for compensation for breach of a promise to do anything at a specified time, or upon the happening of a specified contingency is three years reckoned from the date when the time specified arrives or the contingency happens In the present case, in my opinion, the time for the payment being the date of redemption of the principal mortgage the suit could be instituted within 3 years of that date in case the money stipulated under the deed in suit was not paid at the said time. I am, therefore, clearly of opinion, that the plea of limitation set up by the defendant has no force. I am supported in the view which I have taken by a decision of the late Court of the Judicial Commissioner of Oudh reported in *Lal Behari* v. *Satgur Prasad* (1). The appeal was decided by the Hon'ble Sir Louis Stuart, C. J., then a Judge of the late Court. The learned Judge in a case similar to the one before me held that the cause of action for a simple money-decree arose under Art. 65 of the First Sch. to the Indian Limitation Act from the date

(1) 38 Ind. Cas. 480; 3 O. L. J. 714.

when the mortgage was redeemed wholly or in part.

I, therefore, allow the appeal, set aside the decree of the learned Subordinate Judge and restore that of the learned Munsif with costs in all the three Courts. I would, however, like to make a little modification in the decree passed by the learned Munsif and it is this that I would grant the plaintiff-appellant a decree for the sum claimed against the assets of Rachhpal Singh that may have come into the hands of his son Nandan Singh and after his death into the hands of his sons, the defendants-respondents Dwarka Singh, Basu Singh, Bhagauti Singh and Deota Din Singh.

G. H. *Appeal allowed.*

MADRAS HIGH COURT.

SECOND APPEAL No. 1859 OF 1923.

September 6, 1926.

Present:—Mr. Justice Devadoss.

YENNAMANI RAMMANNA—PLAINTIFF—APPELLANT

versus

MASUNARI VENKATANARAYANA—DEFENDANT No. 8—RESPONDENT.

Inam—Karnam *service* inam—*Enfranchisement—Issue of fresh title-deed, effect of—C. P. C. (Act V of 1908), s. 11, Expl. IV—Mortgage suit—Paramount title, whether might and ought to be set up*—Res judicata.

The effect of enfranchisement of *karnam* service *inam* is the doing away with the right or title to the property acquired before the date of enfranchisement. The effect of issuing an *inam* title-deed after enfranchisement in favour of a person is tantamount to Government resuming the *inam* and re-granting it to the person in whose favour the title-deed is issued. When the Government resumes a service *inam*, all the interests of persons who have acquired title prior to the date of enfranchisement cease to have any effect, and the person in whose name the title-deed is made out after enfranchisement gets it free of the interest which other persons had in the property before the date of enfranchisement. [p. 468, col. 2; p. 469, col. 1.]

Venkata Jagannadha v. *Veerabhadraya* (1), followed.

In a suit on a mortgage, although the Court has jurisdiction to adjudicate on the paramount title of a person claiming adversely to the mortgagor and the mortgagee if such a person is made a defendant to the suit, it is not bound to do so if it considers it inconvenient or unnecessary to do so; in other words, it has a discretion in the matter. [p. 471, col. 2.]

The omission of a person who is made a party to a mortgage suit to set up his paramount title does not render the question of his title *res judicata* in a subsequent suit and debar him from setting up such title inasmuch as the enquiry into such questions is only a matter of discretion to the Court, in a mortgage suit and it cannot be said that the matter was one which the party might and ought to have set up in such a suit. [*ibid.*]

Second appeal against the decree of the Court of the Subordinate Judge, Rajahmundry, in A. S. No. 98 of 1922 (A. S. No. 53 of 1922 on the file of the District Court, Godavari), preferred against a decree of the Court of the Additional District Munsif, Rajahmundry, in O. S. No. 15 of 1921 (O. S. No. 596 of 1919, on the file of the Court of the Principal District Munsif, Rajahmundry).

Mr. *B. Somayya*, for the Appellant.

Mr. *G. Lakshmanna*, for the Respondent.

JUDGMENT.—The plaintiff's suit is for a declaration that the decree passed in O. S. No. 2 of 1910 is not binding on him so far as the plaint property is concerned and for an injunction restraining the defendants from interfering with his possession and for incidental reliefs. The District Munsif passed a decree in plaintiff's favour. The Subordinate Judge on appeal held that the decree in O. S. No. 2 of 1910 was binding upon the plaintiff and dismissed his suit. The plaintiff has preferred this second appeal.

The suit property was originally *karnam* service *inam*. It was enfranchised in favour of the plaintiff's paternal uncle and title-deed, Ex. D, was issued on 16th October, 1905. Defendants Nos. 1 and 2 had mortgaged the suit property with other property to the father of defendants Nos. 6 and 7 on 26th July, 1897. Defendants Nos. 6 and 7 brought O. S. No. 2 of 1910 on the mortgage and obtained a decree. They now have brought the property to sale. To O. S. No. 2 of 1910 the plaintiff's uncle and the plaintiff, who was then a minor, were made defendants on the ground that they were in possession of the property as lessees. The plaintiff's uncle is dead and the plaintiff has brought the present suit for the reliefs above-mentioned. The learned Subordinate Judge has considered the question whether defendants Nos. 1 and 2 had title to the property and whether that title was in any way affected by the enfranchisement. His view is opposed to the decision of the Privy Council in *Venkata Jagannadha* v. *Veerabhadraya* (1). It is well settled that the effect of enfranchise-

(1) 61 Ind. Cas. 667; 44 M. 643; 41 M. L. J. 1; 34 C. L. J. 16; 14 L. W. 59; (1921) M. W. N. 401; 30 M. L. T. 14; 26 C. W. N. 302; A. I. R. 1922 P. C. 96; 48 I. A. 244 (P. C.).

ment of *karnam* service *inam* is the doing away with the right or title to the property acquired before the date of enfranchisement. The effect of issuing an *inam* title-deed after enfranchisement in favour of a person is tantamount to Government resuming the *inam* and re-granting it to the person in whose favour the title-deed is issued. When the Government resumes a service *inam* all the interests of persons who have acquired title prior to the date of enfranchisement cease to have any effect, and the person in whose name the title-deed is made out after enfranchisement gets it free of the interest which other persons had in the property before the date of enfranchisement. It is, therefore, necessary in the case to consider whether defendants Nos. 1 and 2 had any interest in the property and whether such interest was subsisting after the date of the enfranchisement. The only question that needs consideration in this case is, is the plaintiff's suit barred by *res judicata* by reason of the decision in O. S. No. 2 of 1910. In that suit there was no adjudication on the title of plaintiff and his paternal uncle. The paternal uncle remained *ex parte* and the guardian of the plaintiff did not adduce any evidence. They were made parties on the ground that they were in possession as lessees. The question of their title was not specifically raised. The Subordinate Judge held that it was necessary for the plaintiff and his uncle to have repudiated the character of lessees and to have asserted their own right and as they did not do so the present suit is barred by *res judicata*. The question is whether this case comes within Expl. IV of s. 11 of the C. P. C. Is the title of the plaintiff or his uncle a matter which might and ought to have been made ground of defence or attack in the former suit? If it was not a matter which might and ought to have been made a ground of defence or attack in the former suit, then the plaintiff's suit would not be barred.

The view of the Allahabad High Court is that in a mortgage suit the paramount title of a third party who claims adversely to the mortgagor and mortgagee cannot be adjudicated upon. In *Gobardhan* v. *Manna Lal* (2) Bannerji and Abdul Raoof, JJ., observed at page 585*:—

"We must take it as settled law that in a suit brought by a mortgagee to enforce his mortgage a person claiming a title paramount to the mortgagor and the mortgagee is not a necessary party, and the question of the paramount title cannot be litigated in such a suit."

The same view was held in a recent case by the Patna High Court. In *Keshobati Kumari* v. *Satya Niranjan Chakrabarty* (3) Roe and Coutts, JJ., observed at page 187*:—

"It is well settled that in mortgage suits the paramount title of parties other than the mortgagor or his representative-in-interest cannot be gone into."

This is an extreme view. There is nothing in the C. P. C. which prevents the Court from adjudicating in a proper case upon the title of a person claiming adversely to the mortgagor and the mortgagee. It cannot, therefore, be said that the Court acts without jurisdiction if it decides upon the title paramount of a thid person who is made a party to the mortgage suit. This is the view of Sadasiva Iyer, J., in *In re Obalampalli* v. *Ramalakshmanna* (4) and a similar view was held by *In re Krishnaswami Pathan* (5). In *Radha Kunwar* v. *Reoti Singh* (6) the Lord Chancellor in delivering the judgment of their Lordships of the Privy Council observed with reference to certain person who set up adverse claims to the mortgage property and who had been made parties to the mortgage suit:

"Their Lordships think that this joinder of these parties was irregular, and that it could only tend to confusion."

It is clear, therefore, that, where the title could be conveniently tried the Court has jurisdiction to adjudicate upon the title paramount in the mortgage suit.

The leading case on this point is *Jaggeswar Dutt* v. *Bhuban Mohan Mitra* (7). In that case Mookejee, J., after an exhaustive examination of English, American and Indian authorities held that persons claiming adversely to both the mortgagor and mortgagee were not necessary parties. He observed at pages 433 and 440†:—

"It is not competent for the mortgagee to make as party defendant, one who

(2) 46 Ind. Cas. 559; 40 A. 584; 16 A. L. J. 639.

*Page of 40 A.—[*Ed.*]

(3) 47 Ind. Cas. 179; (1918) Pat. 305.

(4) 22 Ind. Cas. 976; (1914) M. W. N. 623.

(5) 8 Ind. Cas. 885; 9 M. L. T. 173.

(6) 35 Ind. Cas. 939; 38 A. 488; 14 A. L. J. 1002; 20 C. W. N. 1279; 20 M. L. T. 211; (1916) 2 M. W. N. 200; 31 M. L. J. 571; 18 Bom. L. R. 850; 24 C. L. J. 303; 5 L. W. 456 (P. C.).

(7) 33 C. 425; 3 C. L. J. 205.

*Page of 47 Ind. Cas.—[*Ed.*]

†Pages of 33 C.—[*Ed.*]

claims adversely to the title of the mortgagor and mortgagee. He is a stranger to the mortgagee, has no connection with the mortgage, and as his adverse claim of title cannot in any way be affected by the mortgage suit, in which he has no interest, he cannot be made a party for the purpose of litigating such claim of title. This view appears to us to be well founded on principle and is not only sustained by a fair and reasonable interpretation of the language of s. 85 of the Transfer of Property Act, but is, as will presently be shown, supported by a considerable body of authorities....The plaintiff, therefore, cannot very consistently make such a stranger, who has no privity with him, a party to his suit to enforce the security."

The case in *Srimanta Seal* v. *Bindubasini Das* (8) to which Mookerjee, J., was a party is strongly relied upon by Mr. Lakshmanna for his contention that the plaintiff's suit is barred by *res judicata*. In that case the plaintiff sued for confirmation of possession upon declaration of title and for an injunction to restrain the execution of the decree. The suit property was an occupancy holding which belonged to a family of *Kundus*. In execution of a money-decree their right, title and interest was sold on 15th December, 1909. The purchaser obtained delivery of possession on 30th January following. On 16th February the purchaser assigned the holding. The mortgagees instituted a suit to enforce their security and made the plaintiff a party to their suit. "The suit was decreed on 27th February, 1914, and the preliminary decree was made absolute on 29th September, 1915. On 14th August, 1911, the plaintiff commenced the present suit on the ground that the mortgage was inoperative because the holding was non-transferable, that the decree passed thereon was equally inoperative and that he had acquired a title independent of the mortgage under a settlement from the superior landlord taken on the 1st September, 1910. The lower Courts dismissed his suit." The High Court held that his suit was barred by a previous suit. Mookerji, J., observed at page 185* :—

"Here the plaintiff was a defendant in the mortgage suit. He had a two-fold character; as purchaser of the equity of redemption, he was properly before the Court; as settlement holder from the superior landlord, he could set up a defence that the mortgage could not be enforced against the property in his hands. He did not take that defence, and the result was that a decree was made for sale of the mortgaged property in his presence. The decree is operative against him and he will be bound by the result of the sale in execution. In the present litigation, he seeks to avoid the decree and to make it inoperative, though it was passed in his presence and is obligatory upon him. Clearly such a course is not permissible....."

In that case the plaintiff contended that the mortgage itself was inoperative. He should have set up that defence in the mortgage suit itself to which he was a party. Where a person who is not a party to the mortgage but is added as a defendant to a mortgage suit sets up the plea that the mortgage is inoperative, he is bound to prove it and if he does not and if a mortgage decree is passed, it must be held that his plea is found against. The case would be different where a third person claims the property as his independently of the mortgagor and mortgagee. It is unnecessary in his case to contend that the mortgage is inoperative for the mortgagor had no title to the property and any transaction by him with regard to the property would not in any way affect the real owner. This case is distinguishable from the present inasmuch as the plaintiff herein relies upon a title independently of the mortgagor and the mortgagee and does not merely contend that the mortgage is inoperative The cases in *Hare Krishna* v. *Robert Watson & Co.* (9), *Nafar Chandra Kundu* v. *Ratnamala Debi* (10) and *Bhaja Chowdhury* v. *Chunilal Marwari* (11), do not help the respondents. In *Hare Krishna* v. *Robert Watson & Co.* (9), Maclean, C. J., and Banerjee, J., held that the Court had jurisdiction to try at the instance of the assignee of the equity of redemption the issue whether the mortgage was invalid as against him. In *Nafar Chandra Kundu* v. *Ratnamala Devi* (10), Mookerjee and Teunon, JJ., held that "the general rule that a question of paramount title cannot be properly investigated in a mortgage suit is subject to exceptions." In *Bhaja Chowdhury* v. *Chuni-*

(8) 76 Ind. Cas. 517; 38 C. L. J. 183; A. I. R. 1924 Cal. 138.

*Page of 38 C. L. J.—[*Ed.*]

(9) 8 C. W. N. 365.

(10) 7 Ind. Cas. 921; 13 C. L. J. 85; 15 C. W. N. 66.

lal Marwari (11), Mookerjee, J., observed:—

"The question is not one of jurisdiction, but rather of the form of litigation of the scope of its inquiry; in other words, to use the language of Mr. Justice Gray in *Hefner* v. *N. W. Mutual Life Insurance Co.* (12), the question, whether this issue should be determined in the present suit to enforce the mortgage or in a separate action, was a question of multifariousness or of convenience, affecting the discretion only and not the jurisdiction of the Court."

Nilakant Banerjie v. *Suresh Chandra Mulick* (13) is distinguishable from the present case. In that case one Khogendra applied to be made a party to a mortgage suit. He sets up a paramount title to the mortgage property. He was dismissed from the suit with costs. In a subsequent suit Khogendra's representatives set up a right to redeem the mortgage. Their Lordships observed at page 422*.

"If Khogendra had accepted the position of a person who was entitled to redeem, then, so far from his claims not being conveniently tried in that suit, he was (apart from the doctrine of *lis pendens*) a necessary party to that suit, and his claims could not be conveniently or properly tried in any other suit; but, not accepting that position, his claims were tried in that suit so far as concerned the question whether or no he was entitled to redeem, and it was held on his own showing that he was not entitled to redeem, and on that ground he was dismissed."

His title to redeem having been found against, he is not entitled to a subsequent suit to set up the right to redeem the mortgage. In *Pumulli Manakal Narayanan Nambudripad* v. *Venkitajela Aiyar* (14) it was held that it would not be irregular in a suit for redemption for the mortgagor to join as defendants persons who claim the property adversely to himself.

I think from the above cases the following proposition may be deduced :—

1. A person claiming adversely to the mortgagor and mortgagee is not a necessary party to a mortgage suit. If he is made a party he can get himself dismissed from the suit.

2. If the mortgagee makes a person defendant who has not derived title from the mortgagor on the ground that he is in possession of the mortgage properties such person is not a necessary party and need not defend his title to the property.

3. In a redemption suit by the mortgagor a person in possession of the mortgage property can be made a party if it would be convenient to adjudicate on his title in that suit for redemption which is really one for possession.

4. Any person interested in the redemption of a mortgage is a necessary party to the mortgage suit.

5. The Court has jurisdiction to adjudicate on the paramount title of a person claiming adversely to the mortgagor and the mortgagee if such a person is made a defendant to the suit.

6. The Court is not bound to adjudicate on the title paramount of a third person if it considers it inconvenient or unnecessary to do so; in other words the Court has a discretion in the matter.

Under O. XXXIV, r. 1, all persons having an interest in the mortgage security or in the right of redemption shall be joined as parties to any suit relating to the mortgage. In s. 85 of the Transfer of Property Act the clause is "persons having an interest in the property comprised in the mortgage." The change in the wording is adversely made. Only the persons who are interested in the mortgage security or in the right of redemption should be joined as parties. The person who claims a paramount title to the mortgage property need not be made a party. The change in the wording was evidently made to set at rest the conflicting views of the different High Courts on the point. When it is a matter of discretion with the Court to adjudicate or not upon the paramount title of a third person, can it be said that the matter is one which comes within Expl. IV of s. 11. Explanation IV refers to any matter which might and ought to have been made a ground of defence or attack in the former suit. The word "and" makes the meaning clear. Where it is entirely in the discretion of the Court to allow the paramount title of a third person to be gone into or not, it cannot be said that it is a matter which might and ought to have been made a ground of defence or attack in the former suit. Explanation IV to s. 11, C. P. C., does not apply to the case as the plaintiff's title to the suit property

(11) 5 C. L. J. 95; 11 C. W. N. 284.
(12) (1887) 123 U. S. 747; 31 Law. Ed. 309.
(13) 12 C. 414; 12 I. A. 171; 9 Ind. Jur. 439; 4 Sar. P. C. J. 685; 6 Ind. Dec. (N. S.) 281 (P. C.).
(14) 40 Ind. Cas. 414; (1917) M. W. N. 417; 5 L. W. 615.

*Page of 12 C.—[*Ed.*]

need not have been made a ground of defence or attack in the former suit. I hold that the plaintiff's suit is not barred by *res judicata* by reason of the decision in O. S. No. 2 of 1910.

In the result the second appeal is allowed and the decree of the Subordinate Judge is set aside and that of the District Munsif restored with costs here and in the Court below.

V. N. Y. *Appeal allowed.*
A. N. A.

OUDH CHIEF COURT.

SECOND CIVIL APPEAL No. 42 OF 1926.
November 30, 1926.
Present:—Mr. Justice Misra.
TEGH BAHADUR KHAN—DEFENDANT—APPELLANT
versus
NAKKO KHAN AND ANOTHER—PLAINTIFFS,
YASIN KHAN AND OTHERS—
DEFENDANTS—RESPONDENTS.

Family arrangement—Agreement between members of family—Application to Revenue Court to record agreement—Family settlement—Agreement, validity of—Estoppel of parties from questioning settlement.

Where all the members of a family after the death of the last owner of the property join together in filing an application for mutation of names and request the Revenue Court to enter the names of all of them in the Revenue Records, they must be deemed to have arrived at what may be styled as a family arrangement settling their future disputes. [p. 473, col. 2; p. 474, col. 1.]

In order to make a valid and binding family arrangement it is not necessary that all the members of the family must be parties to it. [p. 474, col. 1.]

The parties to an agreement evidencing a family arrangement are estopped from setting up any claim inconsistent with such an agreement even if it was based on mistaken recognition of an existing right of the persons setting up the claim. [p. 474, col. 2.]

An agreement of the nature of a family arrangement does not require either writing or registration. [p. 473, col. 1.]

Second civil appeal against a decree of the Subordinate Judge, Sultanpur, dated the 14th October, 1925, confirming that of the Munsif, Sultanpur, dated the 18th December, 1924.

Mr. *Ali Zaheer*, for the Appellant.

Mr. *Zahur Ahmad*, for the Respondents.

JUDGMENT.—This is an appeal by defendant No. 1 in a suit brought by the plaintiffs against him and other defendants for declaration of their right in respect of a certain property and also for a decree for possession in respect thereof. The property in suit consists of $\frac{1}{3}$rd share in *Khata Khewat* No. 1/5, measuring 5 *bighas*, 3 *biswas* and 14 *biswansis* and one house No. 39/37 situate in village Ferozepurkalan, District Sultanpur. The plaintiffs are Nakko Khan and Mazhar Khan, sons of one Shahadat Khan and the principal defendant who is the appellant in this Court is one Tegh Bahadur Khan, son of Sahibazad Khan. The plaintiffs-respondents brought their suit on the allegations that the property in suit belonged to one Bakhsh Khan Bachgoti, in whose family there was a custom by virtue of which daughters and daughters' sons were excluded from inheritance and that the reversioners succeeded irrespective of their being nearly or remotely related to the ancestor, whose property they were entitled to claim. It was alleged that the said Bakhsh Khan died 13 years ago without leaving any male issue and that *Musammat* Shaquran, his widow, succeeded to the property left by him, who herself died in 1907. The plaintiffs alleged that they were some of the reversionary heirs of Bakhsh Khan, husband of *Musammat* Shaquran, and were, therefore, entitled to a decree of $\frac{1}{3}$rd share in the property left by Bakhsh Khan.

The defence raised in the suit was to the effect that the plaintiffs being remote reversioners of Bakhsh Khan when compared to the defendant were not entitled to any decree. The custom set up by them was denied. In replying the plaintiffs pleaded an agreement among all the reversionary heirs that had been arrived at soon after the death of *Musammat* Shaquran to the effect that they were all to be treated as entitled to the property left by her and which belonged to her husband irrespective of the consideration whether they were related in a near or remote degree. The contention was to the effect that by virtue of this agreement the defendant No. 1 was estopped from denying the title of the plaintiffs to the property in suit.

The learned Munsif of Sultanpur, who tried the suit, overruled the plea of custom, but held that the agreement set up by the plaintiffs had been established and that the defendant No. 1 was estopped from denying plaintiffs' title to the property in suit. On these findings he decreed the plaintiffs' claim.

On appeal the learned Subordinate Judge of Sultanpur came to the same conclusion and, therefore, dismissed the defendant's appeal. The defendant No. 1 has now come to this Court in second appeal.

The principal point which was argued on behalf of the defendant-appellant before me was to the effect that the agreement set up by the plaintiffs in reply to the defence raised by the appellant could not be recognised in law and there being no agreement in writing and registered no title had been created in favour of the plaintiffs and they could not, therefore, succeed on the basis of the said agreement. It was also argued by the learned Counsel appearing on his behalf that the agreement being one that could not be recognised in law, there could be no estoppel in the way of the defendant to deny the plaintiffs' title. In reply it was urged by the learned Pleader for the plaintiffs that the agreement being of a nature of the family arrangement did not require to be in writing, nor did it require to be registered. He also relied upon the plea of estoppel raised by his clients (plaintiffs) in the Court below.

Regarding the first argument I am of opinion that the agreement was really of a nature of a family arrangement and, therefore, did not require either writing or registration. This principle has been consistently recognized both by the Allahabad High Court and by the late Court of the Judicial Commissioner of Oudh in a series of cases, which I am now going to quote. In *Kokla* v. *Peary Lal* (1) it was held by Richards, C. J., and Banerji, J., that where petitions were made in the course of mutation proceedings pending in a Revenue Court showing that the parties settled their differences by entering into a family arrangement, that was embodied in the application presented by them to the Revenue Court, the application could not be considered to be one that required registration and was, therefore, admissible in evidence even if not registered. In *Daya Shankar* v. *Hub Lal* (2) the same view was upheld. In *Dilipat Singh* v. *Kashi Nath* (3), Mr. Lindsay, J. C., (now Mr. Justice Lindsay) held that where several members of a family made a settlement of their dispute, each one relinquishing his claim in respect of the property not falling to his share and recognizing the rights of the others, as they had previously asserted it, to the portions allotted to them respectively, the transaction should be called a family arrangement and must be upheld as such. The learned Judge observed in that case that the test of such an arrangement was that it constituted a recognition of pre-existing title and not that the parties derived any title from each other. The ruling of their Lordships of the Privy Council reported as *Khuni Lal* v. *Kunwar Gobind Krishna Narain* (4) was followed in support of the decision. In *Satrohan Lal* v. *Nageshar Prasad* (5), which was a decision of a Bench of the late Court of the Judicial Commissioner of Oudh consisting of Messrs. Lindsay and Stuart (now Mr. Justice Lindsay and Sir Louis Stuart, C. J.,) it was held that where a binding family arrangement had been arrived at by way of compromise it could not be considered that it was anything more than an admission or acknowledgment of title already in existence and that, therefore, such arrangement did not require registration. The same view was held in two cases decided by the same Court [*vide Shankar Singh* v. *Kalka Baksh Singh*(6) and *Gandharp Singh* v. *Nirmal Singh* (7).] In the last of these cases the learned Judges went to the extent of holding that in order to validate a family settlement it was not necessary to establish that there was an existing dispute. It was sufficient, in the opinion of the learned Judges to recognise the validity of a family arrangement if it was shown that there was a possibility of future dispute, which might result in litigation, and that such possible litigation had been avoided and the family property consequently preserved. I may also refer to an earlier case, decided by Mr. Lindsay, J. C, and reported in *Ram Sarup* v. *Bindeshuri* (8).

After considering all these authorities it appears to me to be quite plain that when all the members of the family of Bakhsh Khan after the death of *Musammat* Shaquran, joined together in filing their application for mutation of names asking the Revenue Court to enter the names of all

(1) 21 Ind. Cas. 29; 35 A. 502; 11 A. L. J. 765.
(2) 27 Ind. Cas. 497; 37 A. 105; 13 A. L. J. 21.
(3) 24 Ind. Cas. 512; 17 O. C. 108.
(4) 10 Ind. Cas. 477; 33 A. 356; 15 C. W. N. 545; 8 A. L. J. 552; 13 C. L. J. 575; 13 Bom. L. R. 427; 10 M. L. T. 25; (1911) M. W. N. 432; 21 M. L. J. 645; 38 I. A. 87 (P. C.).
(5) 35 Ind. Cas. 770; 19 O. C. 75; 3 O. L. J. 339.
(6) 39 Ind. Cas. 545; 21 O. C. 346.
(7) 54 Ind. Cas. 325; 22 O. C. 300; 6 O. L. J. 529.
(8) 27 Ind. Cas. 938; 2 O. L. J. 67; 18 O. C. 51.

of them in the Revenue Records, they must be deemed to have arrived at what may be styled as a family arrangement settling all their future disputes. This is evidenced by Ex. 5 and the statement recorded in the Revenue Court, which is Ex 6. It was contended before me by the learned Counsel for the appellant that the respondents should not be allowed to set up a case of a family arrangement inasmuch as such a plea had not been set up by the plaintiffs in the Courts below. In my opinion this argument is of no substance. If the plaintiffs set up an agreement, which was pleaded to operate as an estoppel in the way of the defendant No. 1 from denying the title of the plaintiffs, and that agreement could be deemed to be of a nature of family arrangement, I do not see why the plaintiffs should not be allowed to treat this as a family arrangement. It was argued that the arrangement could not be considered of the nature of a family arrangement, since all the members of the family were not established to be parties to it. I must reject this ground for two reasons: firstly, that it is amply established from the evidence on the record, to which the Courts below have referred in their judgments and which is both oral and documentary that the arrangement was arrived at among all the reversioners of Bakhsh Khan secondly, that it is not, in my opinion, necessary that in order to make a valid and binding family arrangement all the members of the family must be parties to it. I do not see any force in this last contention. If some members of the family settle their disputes by arriving at a settlement among themselves there is no reason why that settlement should not be considered to partake of the nature of family arrangement. For these reasons I hold that the plaintiffs-respondents have succeeded in establishing a valid and binding family arrangement, which was arrived at among all the members of the family of Bakhsh Khan on the death of his widow *Musammat* Shaquran to the effect that they would be entitled to claim their respective shares in the property of Bakhsh Khan irrespective of the consideration, whether they were nearly or remotely related to the said Bakhsh Khan.

Regarding the pleas of estoppel it was urged by the learned Counsel for the appellant that if the agreement was invalid in law, the very basis on which the plea of estoppel could be founded must be deemed to have been destroyed. I have already decided that the agreement relied upon by the plaintiffs-respondents was a good and valid agreement and consequently the contention raised by the learned Counsel for the appellant must fail.

It was also contended by him that the plaintiffs respondents could not succeed in their claim merely upon the basis of the plea of estoppel and no decree could be passed in their favour until they had established their title independently of the agreement as one based on a transfer from defendant No. 1, who had been held to be the person really entitled to the property. I regret I cannot accept this view. In *Bhagwant Singh* v. *Rajja Singh* (9) the plaintiffs of that suit had joined the defendants as plaintiffs in a previous suit for possession in respect of a certain property. The defendants had incurred expenses in the litigation. Subsequently after the decree had been passed the plaintiffs brought a suit against the defendants for recovery of those shares which the latter had obtained in the previous litigation. It was held by Lindsay, J. C., that the plaintiffs were estopped from denying the title of the defendants and thereby claiming the property. In *Sheoambar Singh* v. *Balbhadra Singh* (10), Kanhaiya Lal, A. J. C., took the same view. In that case it was established that the nephews and grand-nephews had agreed to unite and claim the property from the daughters and to divide it among themselves. The decree had been obtained and the property was divided without any consideration whether any of the claimants were nearly or remotely related to the person, whose property they had claimed. The nephews after obtaining the decree set up a claim in respect of the entire property, obtained both by the nephews and grand-nephews on the ground that they being nearer collaterals of the deceased were entitled to inherit the estate in preference to the grand-nephews. It was held that nephews were estopped from setting up the claim by virtue of the agreement entered into between them and the grand-nephews, whether that agreement was based on correct or on mistaken recognition of an existing right of the grand-nephews. In my opinion, therefore, the plaintiffs are

(9) 9 Ind. Cas. 415.
(10) 28 Ind. Cas. 357; 2 O. L. J. 137; 18 O. C. 61.

entitled to base their claim upon a title recognized by the defendant-appellant and which he is now estopped from denying. In my opinion it makes no difference whether the persons against whom the estoppel is urged happen to be the defendants or the plaintiffs.

In the case before me the person against whom the estoppel is urged happens to be the defendant, whereas in the two cases quoted by me above the persons against whom the estoppel was successfully pleaded happened to be the plaintiffs. If the title of a plaintiff in a case in respect of a certain property has been admitted by the defendant or if the defendants' title has been admitted by the plaintiff and either of the parties to the case is estopped from denying the title of the other, it appears to me to be difficult to perceive any distinction in the two cases. It was laid down by their Lordships of the Privy Council in *Muhammad Imam Ali Khan* v. *Husain Khan* (11) that where the plaintiff could not be considered to be barred by any rules of estoppel his title was enough to give him a decree. Their Lordships observed in that case on page 109*: "If then there is no transfer, no estoppel, no bar by time, no trust, why should not the plaintiff assert his legal rights, whatever he may, in ignorance of the facts or in deference to his uncle or for any other cause not injurious to the defendant, have admitted?"

As I have stated above, it appears to me that if a plaintiff can assert his claim to a particular property, there being no estoppel in his way, and if he is entitled to a decree in respect of the property to which he is legally entitled. I do not see any reason why the plaintiff, whose title has been admitted by the defendant and which title the latter is estopped from denying should not be given a decree in his favour.

The appeal, therefore, fails and is dismissed with costs.

G. H.

A. N. A. *Appeal dismissed.*

(11) 26 C. 81; 25 I. A. 161; 2 C. W. N. 737; 7 Sar. P. C. J. 432; 13 Ind. Dec. (N. S.) 656 (P. C.).

*Page of 26 C.—[*Ed.*]

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 245 OF 1924.

September 30, 1926.

Present:—Mr. Justice Devadoss.

THE SECRETARY OF STATE FOR INDIA REPRESENTED BY THE COLLECTOR OF ANANTAPUR—DEFENDANT—APPELLANT

versus

K. SUBBA RAO—PLAINTIFF—RESPONDENT.

Madras Irrigation Cess Act (VII of 1865), s. 1—Water springing from Government poramboke *land—User for over 60 years by* ryotwari *tenant—Water-cess, whether leviable.*

Water which naturally springs up from underground in Government *poramboke* land without its source being in any way traceable to any of the sources of water mentioned in s. 1, Madras Irrigation Cess Act of 1865, and which has been used by a *ryotwari* tenant for over 60 years through a channel to irrigate his land is not liable to be assessed to water-cess under the Act. [p. 476, col. 1.]

There is nothing in law to prevent a *ryotwari* tenant from acquiring a right of easement by prescription against Government provided the user fulfills the conditions necessary for the purpose of making out an easement by prescription. [p.476, cols. 1 & 2.]

Second appeal against a decree of the District Court, Anantapur, in A. S. No. 7 of 1922, preferred against that of the Court of the District Munsif, Anantapur, in O. S. No. 176 of 1920.

The Government Pleader, for the Appellant.

Mr. *V. S. Narasimhachariar*, for the Respondent.

JUDGMENT.—The only point in this case is whether the Government is entitled to levy water rate on the extent of wet cultivation on the lands in plaintiff's occupation. The source of supply is a spring in Government *poramboke* land and the water is taken by means of a channel to the plaintiff's land. The plaintiff's case is that he and his ancestors have been using the water of the spring taken through the channel for over 80 years. The finding is that the enjoyment has been for over 60 years. Both the lower Courts have given a decree to the plaintiff and the Secretary of State has preferred this second appeal.

The contention of the learned Government Pleader is that the Government is entitled to levy water-cess under Act VII of 1865, whatever may be the source of irrigation. Here the channel marked A, B, C. in the plan along which the water flows is said to have been dug by the plaintiff's ancestors and it is also alleged that the source of the spring is in a well or ditch

sunk by the plaintiff's family. The water wells up from the ground and flows through the channel to the plaintiff's land. It is admitted that there is no source of water—any work or any construction—near the spring. The water seems to well up from underground and flow through the channel. The contention of the appellant is that the water wells up in Government *poramboke* land and is taken along a channel which is also in *poramboke* land and, therefore, the Government is entitled to levy water cess. The plaintiff's contention is that the channel was constructed by his ancestors, and he has been taking water from the spring for the last 80 years. The question is whether the source of the water could be brought within s. 1 of Act VII of 1865. Section 1 (*a*) is in these terms:—

"Whenever water is supplied or used for purposes of irrigation from any river, stream, channel, tank or work belonging to....."

and s. 1 (b) is as follows :—

"Whenever water by direct or indirect flow or by percolation or drainage from any such river, stream, channel, tank or work from or through adjoining land irrigates any land under cultivation or flows into a reservoir and is thereafter used for irrigating, etc."

It is admitted that the water does not come from any river, stream, channel, tank or work belonging to or constructed by Government and also that the water of the spring is not by percolation, direct or indirect by flow or damage from any river, stream, channel or tank or work from or through adjoining land. Seeing that there is no river or stream or channel belonging to Government or any work constructed by Governmant which can be taken as the source of supply to the spring, s. 1 cannot apply. Where water springs up from underground and that is used by a *ryot* for over 60 years, the question is whether he acquires a right of easement to the free flow of water without being subject to the provisions of the Irrigation Cess Act. It is contended for the appellant that there could be no right of easement in the case of a *ryotwari* tenant against Government. I am unable to uphold this contention. Every *ryot* can acquire by prescription title against Government and if he could acquire prescriptive title against the Government he could also acquire a right of easement against Government provided the user fulfills the conditions which are necessary for the purposes of making out an easement by prescription. In this case the finding is that the water of the spring has been used for over 60 years to irrigate the plaintiff's lands. That being so, the Government is not entitled now to levy water-cess on the portion cultivated with the help of the water of the spring. The bed of the channel having been enjoyed by the plaintiff for carrying the water for over 60 years, is subject to the easement right of the plaintiff. The only question, therefore, is whether the water which springs up from below can be brought within s. 1. I have no hesitation in holding that water which naturally springs up from underground without its source being in any way traceable to any of the sources of water mentioned in s. 1 cannot be the subject of assessment under the Irrigation Cess Act.

It is unnecessary in this view to consider the case relied upon by both sides *Chinnappa Mudaliar* v. *Sikka Naikan* (1) and *Kesari Venkata Subbiah* v. *Secretary of State* (2).

In the result the second appeal fails and is dismissed with costs.

V. N. V. *Appeal dismissed.*

(1) 24 M. 36; 10 M. L. J. 249.
(2) 20 Ind. Cas. 804; 14 M. L. T. 131.

ALLAHABAD HIGH COURT.

EXECUTION SECOND APPEAL No. 63 OF 1926.

October 22, 1926.

Present:—Mr. Justice Kendall.

LAKHMI CHAND—DECREE-HOLDER—APPELLANT

versus

KEDAR NATH—JUDGMENT-DEBTOR—RESPONDENT.

Insolvent Debtors Act, 1848, (11 & 12 Vic., c. 21), s. 3—Undischarged insolvent—Property acquired subsequently—Bona fide *purchaser, position of.*

Where a person has been declared an insolvent under the Insolvent Debtors Act and has not been discharged, he can enter into transactions dealing with property acquired by him subsequently which vests in the Court under s. 7 of the Act, but he does so only as an agent of the Court until the assignee intervenes. The title to the property vests in the Court or the Official Assignee, but if the insolvent enters into transactions with other persons, which transactions are *bona fide* and for value so far as the

other persons are concerned, the Court and the Official Assignee will not be able to repudiate those transactions to the detriment of the persons who have entered into them with the insolvent. [p. 477, col. 2; p. 478, col 1.]

Execution second appeal against a decree of the District Judge, Agra, dated the 26th August, 1925.

Mr. *S. K. Dar*, for the Appellant.

Mr. *N. P. Asthana*, for the Respondent.

JUDGMENT.—This is an appeal against the order of the District Judge of Agra, setting aside the order of the Second Additional Subordinate Judge disallowing an objection of the judgment-debtor, named Kedar Nath, to the execution of a decree against him. The decree-holder is the present appellant.

The circumstances of the case are briefly as follows:—

The judgment-debtor, Kedar Nath, was declared an insolvent under the Insolvent Debtors Act of 1848, and has not been discharged. The decree holder is applying to execute his decree by attaching the judgment-debtor's property acquired after the insolvency, but has not issued notice to the Official Assignee. The claim of the judgment-debtor in the first Court was that the decree could not be executed without making the Official Assignee a party to the proceedings. The first Court relying on a decision of this Court published in *Chhote Lal* v. *Kedar Nath* (1), allowed the objection. The learned District Judge decided that the first Court had been misled by that decision, and allowed the appeal; but at the same time directed that a copy of his order should be sent to the Official Assignee.

In view of the decisions quoted on either side, the legal position is at first sight somewhat difficult. Under s. 7 of the Indian Insolvency Act of 1848, the Court of Insolvency may order that all the estate and effects of the petitioner at the time of the petition and also all future estate etc., shall vest in the Official Assignee and it has never been denied that such an order was made in the present case. A series of rulings have been quoted on behalf of the appellant in the present case to show that, in spite of this provision of the Act, the judgment-debtor does, nevertheless, retain an interest in his property. Thus, in *Chhote Lal* v. *Kedar Nath* (1) a Bench of this Court held that, in spite of the fact that the future property of an insolvent under this Act was to vest in the Official Assignee, the insolvent had power to dispose of any property that he might acquire after being declared an insolvent, and also that persons dealing with him *bona fide* and for a consideration were to be discharged from making a further payment to the Official Assignee, provided the transaction took place before the Official Assignee intervened and claimed the property on behalf of the insolvent's estate. That order was passed after a consideration of various rulings to the same effect, including *Alimahmad Abdul Hussain* v. *Vedlal Devchand Parekh* (2) and *Cohen* v. *Mitchell* (3). These decisions show clearly that a bankrupt, who has not obtained his discharge, may enter into transactions in respect of properties acquired after the bankruptcy, and that until the trustee intervenes, all such transactions with any person dealing with the bankrupt *bona fide* and for value, and whether with or without knowledge of the bankruptcy, are valid against the trustee.

On what principle are these decisions based? The learned District Judge appears to have considered that they were based on the principles of equity only, and he has not dealt with the principle of law underlying the decisions on which the decree-holder-appellant comes into Court, which is said to be that the judgment debtor himself, though he has been declared insolvent, still retains an interest in his property in spite of the provisions of the Act by which the title vests in the Official Assignee. The principle relied on in the case of *Cohen* v. *Mitchell* (3) appears to me as follows:—The bankrupt can still enter into transactions dealing with the property which vests in the Court; but he only does so as an agent of the Court, unless and until the Official Assignee intervenes. The title to the property still vests in the Court or the Official Assignee as indeed is shown by the provisions of the Act to which I have already referred; and to this extent I agree with the lower Appellate Court but if the insolvent enters into transactions with other persons, which transactions are *bona fide* and for value so far as the other persons are concerned, the Court and the Official Assignee will not be able to repudiate those transactions to the

(1) 84 Ind. Cas. 289; 22 A. L. J. 455; 46 A. 565; A. I. R. 1924 All. 703; L. R. 5 A. 329 Civ.

(2) 53 Ind. Cas 197; 43 B. 890; 21 Bom. L. R. 849.

(3) (1890) 25 Q. B. D. 262; 59 L. J. Q. B. 409; 63 L. T. 206; 38 W. R. 551; 7 Morrell 207.

detriment of the persons who have entered into them with the bankrupt. I can find no authority for the view that has been argued on behalf of the appellant in this Court that the effect of these decisions is to show that the insolvent still retains a proprietary interest in the property that is vested in the Court by virtue of his insolvency; but, on the other hand, the judgment-debtor has no *locus standi* in his own right and can only object to the attachment through his principal, *viz*, the Court of Insolvency or the Official Assignee.

The effect of the District Judge's order would be that the application for execution would be disallowed. For the reasons given above, I am of opinion that it should not be disallowed. At this stage, however, it is clear that the Official Assignee should be made a party to the proceedings, and I notice that the learned District Judge has directed a copy of his order to be sent to him. I need not now do any more as regards the Official Assignee than to order a copy of this appellate order to be sent to him in continuation.

The final result is that the appeal is allowed to this extent, that the application for execution will be allowed to proceed. If the Official Assignee takes no steps in the matter, the judgment-debtor may be considered to be representing the Court of Insolvency, and execution may proceed against him. The appellant-decree-holder will receive his costs throughout, as in the view I have taken the judgment-debtor-respondent was wrong in objecting to the attachment in the first Court.

Z. K. *Appeal allowed.*

OUDH CHIEF COURT.

FIRST CIVIL APPEAL No. 2 OF 1925.

November 29, 1926.

Present:—Sir Louis Stuart, KT., Chief Judge, and Mr. Justice Hasan.

HADI HASAN KHAN—PLAINTIFF—APPELLANT

versus

KAZIM HUSAIN AND OTHERS—DEFENDANTS—RESPONDENTS.

Res judicata—*Suit based on title by inheritance—Conditional decree—Condition not satisfied within time—Fresh suit on same title*—Res judicata.

A person sued for his share of certain property as an heir and the case being referred to arbitration he obtained a decree subject to the payment of a certain sum of money. He failed to execute the decree within time and instituted a fresh suit:

Held, that a fresh suit on the same title was barred by *res judicata*. [p. 480, col. 2; p. 482, col. 1.]

Maina Bibi v. *Vakil Ahmad* (1), distinguished.

Appeal against a decree of the Subordinate Judge, Sultanpur, dated the 8th September, 1921.

Messrs. *Niamat Ullah* and *Naimullah*, for the Appellant.

Messrs. *Hyder Husain*, *Napindra Nath Datt*, *Ali Zaheer* and *Ginesh Prasad*, for the Respondents.

JUDGMENT.

Stuart, C. J.—This is a plaintiff's appeal. The facts of the suit against the decree in which the appeal is filed are as follows: A certain Anwar Ali Khan was the owner of four villages in the Sultanpur District which were known as the Bhain Estate. On the death of Anwar Ali, Wazir Ali Khan, his eldest son by his elder wife, obtained possession of the estate as head of the family. A moiety of the estate passed subsequently into the possession of the descendants of Anwar Ali from his younger wife. A half share in the villages comprising the estate had apparently been entered in the name of Enayat Ali, a younger uterine brother of Wazir Ali Khan, and we find that in the year 1875 (Ex. 12) Enayat Ali executed a deed, to which there were no other parties, by which he stated that he would lay no claim to the half shares in the villages, which were entered in his name, unless and until he had re-paid to his brother Wazir Ali Khan certain sums which the latter had expended for the benefit of the estate. He further agreed that the profits of the estate (or a portion of it at any rate) which were enjoyed by a mortgagee in possession would include the profits of his share also, and that Wazir Ali Khan should keep the accounts of both of them in respect of the mortgaged property. This is the construction which we place upon that document Ex. 12. In the year 1901, the plaintiff-appellant in the present proceedings, a grandson of Enayat Ali Khan, instituted a suit against Mehdi Husain Khan, Abid Husain Khan and Yusuf Husain Khan (the defendants Nos. 1 to 3 in the present proceedings) who were the grandsons of Wazir Ali Khan. In this suit he claimed possession of his share in the Bhain Estate under the Muhammadan Law. As would appear from the arbitrator's award, upon which

this claim was eventually decided, he based his right to succeed partly upon the agreement (Ex. 12) to which we have already referred. After considerable litigation the matter was referred to the arbitration of Syed Zamir-ud-din, Vakil, and decided by him under an award dated the 15th September, 1906, (Ex. 11). Upon this award a decree was passed on the 12th November, 1906, (Ex. 10). The words in the decree in so far as we are concerned with them are as follows:

"The plaintiff's claim for possession of the half share out of 8-annas share of Taluqa Bhain . . . on payment of Rs. 21,835 5-2 to defendants Nos. 1, 2 and 3 (*i e.*, the present defendants Nos. 1 to 3) with interest on the aforesaid sum at 8-annas per cent. per mensem from the date of the institution of the suit till the date of the realization (shall) be decreed against the defendants Nos. 1 to 3."

No payment was made under this decree, and possession did not pass through the Courts to the plaintiff-appellant. The persons in possession of the estate were the defendants Nos. 1 to 3. They borrowed money and encumbered the estate extensively, and by the year 1915 the estate had become practically valueless to them. On the 29th May, 1915, Mahabir Prasad, defendant-respondent No. 5 purchased in execution of a Court sale (see sale certificate Ex. 49) the whole of the rights of Mehdi Husain Khan, Abid Husain Khan and Yusuf Husain Khan in the Bhain Estate, including the rights which they had obtained under the provisions of the decree of 1906 (Ex. 10). Mahabir Prasad subsequently paid off all the major debts of the estate. He has expended altogether Rs. 15,211 upon the property in which defendants Nos. 1 to 3 have no longer any interest. It is to be noted that the property has been valued for the purposes of jurisdiction and Court-fee in this suit by the plaintiff appellant at Rs. 12,000.

In August 1922, the plaintiff-appellant instituted the suit, out of which the present appeal arises, in the Court of the Subordinate Judge of Sultanpur against defendants Nos. 1 to 3 and other transferees including defendant No. 5. Defendant No. 5, Mahabir Prasad, is the person who was mainly interested in contesting the suit. The other transferees had either been paid off by the defendant No. 5, or were transferees of small plots which had originally belonged to defendants Nos. 1 to 3. In so far as we are concerned with the appeal, there are practically only two parties Hadi Husain Khan plaintiff-appellant and Mahabir Prasad defendant No. 5. The plaint in this suit was worded in a manner which is unfortunately not uncommon in Oudh. As far as possible it failed to disclose the plaintiff's real case, but from the proceedings we have no doubt as to what that case was. The plaintiff was clearly endeavouring to support his case under the decree (Ex. 10) of 1906. He asserted that Mehdi Husain Khan, Abid Husain Khan and Yusuf Husain Khan had, after that decree was passed, agreed to restore him to possession of his share in the property upon terms of a most generous kind, which differed completely from the terms given in the decree. Those terms were, according to the plaintiff-appellant, that they were to hold and manage his share for him crediting all profits from the share towards the amount of Rs. 21,835-5-2 awarded by Ex. 10. This generous offer was not, according to the plaintiff-appellant, reduced to writing, it was the subject of a verbal arrangement. The plaintiff-appellant went on to state that on the 9th September, 1914, the same three persons had entered into an agreement with him embodied in a stamped document to refer the matter of the restoration of his property to him to arbitration, and that an arbitrator had been appointed. The award was not delivered till the 30th March, 1917. The arbitrator arrived at the conclusion that only Rs. 1,031-13-6 were due to the defendants Nos. 1 to 3. This award was made a decree of Court, and later on in May 1920 the defendants Nos. 1 to 3 filed a certificate in the Court stating that the money had been paid off, and the plaintiff-appellant thereupon applied to be put in possession of the property in question to the detriment of defendant No. 5. His application for execution was allowed, but defendant No. 5 having obtained from a Criminal Court orders restoring him to possession, the present suit was filed.

The learned Subordinate Judge has dismissed the plaintiff-appellant's suit on the merits. He has found that his allegation as to the oral agreement which embodied the terms of the decree (Ex. 10) is absolutely untrue, and supported by false evidence. He has further found that the written agreement to refer to arbitration, which is alleged to have been executed on the 9th Sep-

tember, 1914, was, as a matter of fact, not executed on that date, and that the said agreement was not genuine but collusive between the plaintiff and defendants Nos. 1 to 3. The learned Counsel appearing for the plaintiff-appellant has not argued against these findings of fact. We have examined the findings for ourselves, and are satisfied that the allegation of the plaintiff-appellant as to the oral agreement is false, and that the written agreement alleged to have been executed on the 9th September, 1914, was actually executed after the purchase by defendant No. 5 of the rights of the defendants Nos. 1 to 3. We find that the plaintiff-appellant and the defendants Nos. 1 to 3 have acted in collusion, fradulently and dishonestly throughout the matter.

The learned Counsel for the plaintiff-appellant, however, has very frankly and very straightforwardly abandoned the bad pleas of his client and has endeavoured to support his client's case on points of law. His case, as we understand it, is that although his client had obtained rights under the decree (Ex. 10) he has still the right to assert his title, which is based upon inheritance under the Muhammadan Law independent of that decree. He does not ask us to consider the suit as a suit based upon the decee (Ex. 10) and he does not contest the position that any attempt to execute the decree, Ex. 10, is now barred by time, but he asks us in effect to ignore the decree, Ex. 10, and permit the plaintiff-appellant to go back to the title which he originally possessed, and to succeed upon its basis. He admits that the sole important person with whom he is now concerned is the defendant-respondent No. 5, his case against him being that the defendant-respondent No. 5 must be considered to be holding the property, as defendants Nos. 1 to 3 held it, on behalf of the plaintiff-appellant as a co-tenant, and that no question of limitation or any other bar can arise between the plaintiff-appellant and defendant No. 5. He agrees that it would be the duty of the plaintiff-appellant to re-imburse the defendant No. 5 for anything that the defendant No. 5 has spent on the property on his behalf, or to re-imburse him for any claims which defendants Nos. 1 to 3 could have enforced against the plaintiff-appellant which had passed from them to the defendant-respondent No. 5. He has referred us to a recent decision of their Lordships of the Judicial Committee in *Maina Bibi* v. *Vakil Ahmad* (1), in support of his argument that the decree, Ex. 10, can be ignored and that his client can be allowed to go back to the position which he had before that decree was passed. I do not consider that that decision of their Lordships lays down any proposition which can assist his client. The point, which their Lordships decided in that case, was that, where a decree had been passed in favour of the heirs of a deceased Muhammadan for a share of the deceased's property subject to their liability to satisfy the widow's dower, and where the widow was allowed to remain in possession until her dower was paid, and the decree allowed a limited period within which the heirs were to pay that dower, and where in default of payment of the amount within that period the suit was to stand dismissed, the circumstance that the money was not paid within that period and the suit was dismissed accordingly could in no way prevent those heirs from bringing a fresh suit to obtain possession of the property upon different terms in respect of their liability to satisfy the dower. But there the *ratio decidendi* was clear. A fresh ground of action had arisen and there could be no question of *res judicata* and there was no bar of limitation. But here the matter is very different. The plaintiff-appellant sued in 1901 claiming his share under the Muhammadan Law in the *taluqa*. His claim was based mainly upon inheritance, although he recognised the validity of Ex. 12. A decree of Court was passed declaring that he should obtain possession of certain property subject to his making good what had been expended for the benefit of the family in the past. The question of his title was definitely and finally determined under the decree, and the question of his title could not be re-opened in another suit. As their Lordships observed at page 156* of the decision already quoted the matter where the question of title has been decided in the former matter. "The two latter matters have been decided in that suit and cannot be re-opened." But what the learned Counsel for the plaintiff-appellant has asked us to do is to re-open the question of title, to ignore the previous decision altogether and pass exactly the same decision which was passed before, because it would

(1) 86 Ind. Cas. 579; 52 I. A. 145; 23 A. L. J. 115; A. I. R. 1925 P. C. 63; 2 O. W. N. 180; L. R. 6 A. (P. C.) 25; 48 M. L. J. 667; 27 Bom. L. R. 796; 47 A. 250; 30 C. W. N. 673 (P. C.).

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suit him better to have the matter decided in this way instead of relying upon the decree upon which he had to rely. It is to be noted that the case presented before us is not the case presented by the plaintiff-appellant in the Court below. He came into the Court below relying upon the decree, Ex. 10, but endeavouring to show that he had actually satisfied it and, his attempt to prove that he had so satisfied it having failed upon the facts, he has now come into the Appellate Court taking a perfectly different position. But even granting that he has a right to take this different position there is no force in his plea. The case stands, in my opinion, at this. The plaintiff-appellant's rights are based upon the decree, Ex. 10, and they are based upon nothing else. This case bears some analogy to the case decided by their Lordships of the Judicial Committee in *Sasi Sekhareshwar Ray* v. *Lalit Mohan Maitra* (2). The plaintiff-appellant's right was not to bring a suit but to execute decree, Ex. 10, and he has no remedy to execute Ex. 10 because his remedy is barred by the Indian Limitation Act. For the above reasons the suit fails on facts and on law and I would dismiss the appeal with costs.

Hasan, J.—The facts of this case and the main conclusions at which we have arrived have been fully stated in the judgment of the Hon'ble Chief Judge and I have very little to add.

The plaintiff's case as presented in the plaint and before the trial Court for decision has failed on evidence. The findings of fact at which the learned Judge of the Court below has arrived are no longer disputed. On the principle *secundum allegata et probata* there is ample justification for dismissing the appeal without any further ado.

The question of law argued before us was that the decree of the 12th November 1906 (Ex. 10) founded on an award of the 15th of September 1906 did not constitute any bar to the adjudication of the question of the plaintiff's original title in the property in suit and that a decree for possession could now be granted in his favour on the basis of that title. In agreement with the opinion expressed by the Hon'ble Chief Judge I have come to the conclusion that the argument must be rejected. In support of the contention the learned Advocate for the plaintiff-appellant strenuously pressed on us the decision of their Lordships of the Privy Council in the case of *Maina Bibi* v. *Vakil Ahmad* (1). According to my judgment the decision does not support the argument for which it is quoted as I will presently show. The suit, which ended in the decree of the 12th of November, 1906, was clearly founded on the right of inheritance which the plaintiff's father, Inayet Ali, had in the estate of Anwar Ali. In that right relief was claimed for possession of the share in Anwar Ali's estate which had devolved under the rules of inheritance upon Inayet Ali on the death of his father, Anwar Ali. It further appears from the award (Ex. 11) that the defendants' (the grandsons of Wazir Ali) possession of the plaintiff's share in the estate of Anwar Ali was alleged to be in lieu of the family debts and by virtue of the deed of the 12th of December, 1875. It also appears from the same document that the plaintiff's case was that the profits of the *sir* lands held by the defendants had satisfied those debts but that "if after making the account of the debt and of the profits there be found anything due to the defendants from the plaintiff then a decree be given to him on the condition of his paying the amount found due from him." This was the nature of the previous suit which ended in the decree on the award. The decree of the Court (Ex. 10) is on the record. The important words of the decree are as follows:

"The plaintiff's claim for possession of the half share out of 8-annas share of *Taluqa* Bhain...on payment of Rs. 21,835-5-2 to defendants Nos. 1, 2 and 3 (the grandsons of Wazir Ali) with interest on the aforesaid sum at 8 annas per cent. per month from the date of institution of the suit till the date of realization be decreed against the defendants Nos. 1 to 3. The plaintiff will pay half the costs of the defendants."

Now, the relief claimed in the present suit is exactly the same as it was in the previous suit. The first relief is a decree for possession of half share in *Taluqa* Bhain, *Mahal* Wazir Ali. The further relief claimed is that if the plaintiff is held liable for payment of any amount then possession be granted on payment of that amount,

(2) 86 Ind. Cas. 245; 52 I. A. 79; A. I. R. 1925 P. C. 34; 48 M. L. J. 20; L. R. 6 A. (P. C.) 23; 27 Bom L. R. 166; 21 L. W. 286; 29 C. W. N. 633; 52 C. 311; 23 A. L. J. 717 (P. C.).

On a comparison of the nature of the previous claim with the claim now under consideration there is no doubt left in my mind that the *res* adjudicated in the previous suit was substantially if not exactly the same as the *res* in litigation in the present suit. It is agreed that if that is so the trial of the present suit is barred by the rule of *res judicata*. To such state of facts the decision of their Lordships of the Privy Council in the case of *Maina Bibi* v. *Vakil Ahmad* (1) is wholly inapplicable. In that case the nature of possession of a Muhammadan widow over the estate of her deceased husband in lieu of her dower was first of all stated at great length by Lord Atkinson in delivering the judgment of the Judicial Committee thus:

"The possession of property being once peaceably and lawfully acquired, the right of the widow to retain it till her dower-debt is paid is conferred upon her by the Muhammadan Law."

Now the dower-debt may be satisfied by the usufruct of the property. The heir is, therefore, always entitled to show that the profits of the estate have been enough to satisfy the claim for dower so long as the widow continues in possession. The defendants in the present suit cannot be placed on the same footing. There is no liability in law to account for profits and there was none imposed on them by the decree of the 12th of November, 1906. In the case before their Lordships of the Privy Council the previous suit for possession was founded on the ground that the widow was not entitled to continue in possession of the estate for the reason that the dower-debt had long previously been paid. The relief, therefore, was for immediate possession of the property. That suit failed by reason of the default made by the plaintiff to pay the dower-debt to the defendant within the period fixed by the decree. The second suit asked for an adjudication as to the account since the year 1903. The time from which the accounting between the parties was to commence is very important and that was the period which had elapsed since the making of the decree in the previous suit. On these grounds their Lordships of the Privy Council held that the second suit was not barred by *res judicata*.

I would, therefore, dismiss the appeal with costs.

By the Court.—The appeal is dismissed with costs.

A. N. A. *Appeal dismissed.*

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 91 OF 1925.

November 30, 1925.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

LAXMIDAS GOCULDAS DOSSA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

ISMAIL GAFOOR KASSUM AND OTHERS—DEFENDANTS—RESPONDENTS.

Probate and Administration Act (V of 1881), ss. 4, 90 (2), (3), (4)—Grant of Letters, effect of—Administrator—Mortgage without permission of Court—Creditor of estate, whether can avoid—Person interested in the property, meaning of.

Where Letters of Administration are granted in respect of the estate of a deceased Muhammadan, the statutory vesting under the Probate and Administration Act takes effect in substitution for the vesting in the heirs which exists between the death of the deceased and the grant of the Letters.

A mortgage made by an administrator without the previous permission of the Court is, by virtue of the provisions of s. 90 (4) of the Probate and Administration Act, voidable at the instance of any other person interested in the property.

A creditor of the deceased is a 'person interested in the property' within the meaning of s. 90 (4) of the said Act and is entitled to avoid a mortgage made by an administrator in contravention of sub-s. (2) or sub-s. (3) of s. 90.

Appeal from the judgment and decree of Kajiji, J.

Mr. *Kanga*, Advocate-General, for the Appellants.

Mr. *Coltman* (with him Mr. *Lalji*), for the Respondents.

JUDGMENT.—One Gaffoor Kassum died on or about February 25, 1922, leaving two sons Ismail and Ibrahim, a widow and a daughter. Ismail obtained Letters of Administration to the estate of Gaffoor on December 19, 1922, under s. 4 of the Probate and Administration Act. The estate of Gaffoor, therefore, was vested in him. It is true, under Muhammadan Law, in the absence of any Letters of Administration being granted, the estate vests in the heirs. But, I think, that the statutory vesting under the Probate and Administration Act must take effect in substitution for the vesting in the heirs which exists between the death of the deceased and the grant of the Letters.

Gaffoor was a tenant of certain stables, rent of which was in arrears at his death. Ismail continued the business, and the arrears of rent continued, with the result that in August, 1923, a settlement was arrived at by which Ismail agreed to pay rent in all Rs. 13,951 up to August 6, 1923, which included the rent that was in arrears at the date of Gaffoor's death.

Eventually, the plaintiff filed a suit against Ismail in which a decree was passed on December 18, 1923, for Rs. 10,951-11-0. As Ismail did not pay this amount, the plaintiff succeeded in getting from Ismail and the other heirs of the deceased Gaffoor a third mortgage in his favour of property situated in Doctor Street by a mortgage dated February 25, 1924. The property was subject to prior mortgages, and was sold in September, 1924, at the instance of the first mortgagee. After paying the two prior mortgages, about Rs. 13,000 remained in the hands of the Solicitors of the first mortgagee to satisfy the third mortgage.

However, there was another claimant to that sum, because the fifth defendant herein had filed a Suit No. 3021 of 1921 against Gaffoor Kassum. A decree was not passed until April 3, 1924, for the amount claimed, against the heirs of Gaffoor to the extent of the property of the deceased in their hands. In execution of that decree the fifth defendant attached the sum of Rs. 13,000 which was the balance after payment of the first two mortgages.

The plaintiff claimed that he was entitled to priority against the attaching creditor by virtue of his third mortgage, and that was the simple question in the case. It was contended that the fifth defendant could not contest the mortgage, although it was made by the administrator without the previous permission of the Court. Under s. 90, sub-s. (4), of the Probate and Administration Act "A disposal of property by an executor or administrator in contravention of sub-s. (2) or sub-s. (3), as the case may be, is voidable at the instance of any other person interested in the property."

It is suggested that the fifth defendant has no interest in the property mortgaged by Ismail. Clearly a creditor of Gaffoor had an interest in all his estate, and is entitled to look to that estate to satisfy his claim, and it is quite clear that an administrator by disposing of property of the estate vested in him, without permission of the Court, cannot thus defeat the claims of the creditors of the deceased.

We think then the Judge was right in his decision, and the appeal must be dismissed with costs.

A. N. A. *Appeal dismissed.*

OUDH CHIEF COURT.

FIRST CIVIL APPEAL No. 52 OF 1925.

November 12 and 29, 1926.

Present :—Sir Louis Stuart, KT., Chief Judge, and Mr. Justice Hasan.

SIR HUKMICHAND KASLIWAL, KT., AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

THE PIONEER MILLS, LIMITED AND OTHERS —DEFENDANTS—RESPONDENTS.

Specific Relief Act (I of 1877), ss. 12, 21 Illus. 3—Promise to advance or borrow money, whether specifically enforceable—Contract to mortgage immoveable property, specific performance of—Transfer of Property Act (IV of 1882), ss. 58 (a), 100—Agreement to make advances to Company on security of moveable and immoveable property—Agreement partly carried out—Liquidation of Company—Party making advances, whether secured creditor or charge-holder—Mortgagee of assets, priority of—Companies Act (VII of 1913), s. 109—Mortgage or charge by Company, meaning of.

Although it is settled in the Law of England that a promise to advance money in loan cannot sustain a suit for specific performance and the converse proposition that a promise to borrow money is not susceptible of specific performance is equally not open to doubt, yet specific performance of a contract to transfer immoveable property by way of mortgage may be granted under cl. (c) of s. 12 of the Specific Relief Act, 1877, where the circumstances make it abundantly clear that the relief by way of damages will not be an adequate relief. [p. 486, col. 2.]

South African Territories Co. v. *Wallington* (1) and *Startup* v. *Macdonald* (2), relied on.

A person who advances money under an agreement entitling him to a charge over the moveables and containing a promise to execute a mortgage in respect of the immoveables in respect of sums advanced, is entitled to a charge over the sale-proceeds of the properties of the Company in the event of its liquidation to the extent of the amounts advanced by him but will not be entitled to priority over mortgagees of the assets ofthe Company. [p. 486, col. 1; p. 487, col. 2.]

Barhamdeo Prasad v. *Tara Chand* (3), followed.

The provisions of s 109 of the Companies Act, relating to a mortgage or charge created by a Company do not apply to a charge arising by operation of law and not by a contract. [p. 487, col. 2.]

Appeal against a decree of the Sub-Judge, Unao, dated the 30th April, 1925.

Messrs. *S. C. Roy*, *Bisheshwar Nath Srivastava* and *Bishambhar Nath Srivastava*, for the Appellants.

Messrs. *H. K. Ghosh*, *Lakshmi Narayan*, *N. N. Sarkar*, *J. Jackson*, *Ram Prasad Varma*, *Vikrmajit Singh*, *A. P. Sen*, *R. S. Seth* and *Girja Shankar*, for the Respondents.

JUDGMENT.—(*November 12, 1926*).—This is the plaintiffs' appeal from a decree of the Subordinate Judge of Unao, dated the 30th of April, 1925. The reliefs for which the suit, out of which this appeal arises was instituted were founded on an agreement of the 14th of February, 1920, between the plaintiffs and the original defendant, the Pioneer Mills, Limited, a Joint Stock Company registered under the Indian Companies Act, 1913, having its registered office in Calcutta and carrying business at Unao in the Province of Oudh. There are three other defendants to the suit, who hold claims against the Pioneer Mills, Limited. It is not necessary to state at this stage of the judgment the precise nature of the claims held by these defendants. The suit at Unao mentioned above was instituted on the 12th of February, 1923.

On an application made to the High Court at Calcutta on the 9th of April, 1923, the Pioneer Mills, Limited, went into liquidation under the orders of that Court dated the 4th of June, 1923. On the 22nd of November, 1923, the High Court at Calcutta granted sanction to the continuance of the suit at Unao as also against the liquidators of the Pioneer Mills, Limited. It is necessary to state the precise terms in which the sanction for the continuance of the suit was accorded. They are as follows :—

"It is ordered that the said Sir Hukmichand Kasliwal and Harkissendas Bhattar be at liberty to make the liquidators of the above named Pioneer Mills, Limited, parties in the above mentioned two suits No. 246 of 1922 and No. 280 of 1923 and then to proceed with those suits and to execute the decrees that may be passed in the said two suits or any of them against the liquidators as defendants in those suits."

On the 1st of April, 1924, the learned Judge who had granted the sanction withdrew it. On an appeal from the order of withdrawal the sanction was restored on the 14th of November 1924. The sanction was in pursuance of the provisions of s. 171 of the Indian Companies Act, 1913. It follows that the Court at Unao was competent to adjudicate on the merits of the suit and also to grant such relief or reliefs which it may deem fit to do as against the liquidators as well.

During the liquidation proceedings in the High Court at Calcutta the entire assets of the Pioneer Mills, Limited, were sold by public auction on the 6th of August, 1923, and the sale-proceeds are now held by the liquidators.

The substance of the claim as now put forward by the plaintiffs is that they are entitled to a declaration that they hold a charge for a sum of Rs. 1,50,000 and interest thereon on the sale-proceeds in the hands of the liquidators. The consequential relief for which they pray is a decree for a sum of Rs. 1,86,000 principal and interest as against the liquidators in enforcement of the said charge.

The defence to this claim was a denial of the execution of the agreement of the 14th of February, 1920, and also, of its validity. It was also denied that the plaintiffs did advance the sum of Rs. 1,50,000 to the Pioneer Mills, Limited. Finally the substantial defence was that the plaintiffs hold no charge on the assets of the Company, moveable and immoveable. There were other defences with which we are not concerned at present and they were embodied in issues Nos. 1, 2, 7, 8, 9 and 10 of the issues framed by the trial Court.

The trial Court has refused to grant the declaration prayed for on the main ground that the charge for which the claim is made does not exist.

On the question of the jurisdiction of the Court and the maintainability of the suit no argument was addressed to us on behalf of the defendants-respondents. We are of opinion that the suit as laid in the Court of the Subordinate Judge of Unao was clearly within its competence and was also maintainable having regard to the terms of the sanction granted by the High Court at Calcutta already referred to.

The basis of the question of law which we have before us for decision rests on two facts :—

(1) The genuineness of the agreement of the 14th, February, 1920, and (2) the advance of the sum of Rs. 1,50,000 by the plaintiffs to the Pioneer Mills, Limited. Those two facts were admitted at the hearing of the appeal before us by the several learned Counsel for the defendants-respondents. They must, therefore, be taken as established facts.

The agreement of the 14th of February,

1920, was not registered. The full text of the agreement is printed at pages 1 to 4 of Part III of the record of the appeal. According to the terms of the agreement the plaintiffs "agreed to make advances subject to the security and to the terms and conditions hereinafter mentioned; and whereas the Company has at present a cash credit account with the Tata Industrial Bank, Limited, on the security of the stock in trade of the Company and whereas the factory of the Company including the land, machinery, plant and structures belonging to it is under mortgage executed in favour of Baldeodas Kedarnath and whereas it has been agreed between the parties that the stock and block under hypothecation and mortgage as aforesaid should be released from the existing incumbrances and should form part of the security in favour of" the plaintiffs. It may here be mentioned that the incumbrances in favour of the Tata Industrial Bank, Limited, and Baldeodas Kedarnath referred to in the quotation just now given have been wiped off since. The Tata Industrial Bank, Limited, is a party defendant to this suit on the ground of another incumbrance in their favour subsequent to the agreement of the 14th of February, 1920. The other two defendants also hold mortgages subsequent to the same date. The question of priority or the order in which the plaintiffs and the three defendants should rank as secured creditors of the 1st defendant, the Pioneer Mills, Limited, is a question in the case but it is not yet ripe for decision. Under the terms of the agreement the advances to be made by the plaintiffs to the Pioneer Mills, Limited, "shall not at any time exceed the sum of rupees fifteen lacs" and "all stock in trade...shall be under hypothecation to...and in the charge and control" of the plaintiffs. The material terms are embodied in cls. 7 and 8 of the agreement and they are as follows :—

"7. That the Company shall, as soon as possible, after the execution of these presents, execute in favour of the *Banians* a regular deed of mortgage of the land, refinery, factory, plants, machineries, implements, structures and building at Unao for the sum of rupees five lacs to meet any deficits that may be due to the *Banians* for the advances made by them after availing of the stock under hypothecation to them as aforesaid.

"8. That the Company shall pay to the *Banians* interest on all the daily balances against the Company at the rate of eight per cent. per annum."

On 16th of February, 1920, the plaintiffs paid to the Pioneer Mills, Limited, the sum of Rs 1,00,000 (Ex. 3). On the 3rd of March, 1920, the plaintiffs offered to redeem the prior incumbrance in favour of the Tata Industrial Bank, Limited, (Exs. 12 and 13). On the 4th of March, 1920, the plaintiffs paid another sum of Rs. 50,000 to the Pioneer Mills, Limited, (Ex. 14). After all this, on the 9th of March, 1920, the Pioneer Mills, Limited, through their Pleader, Babu Bikramajit Singh, despatched a telegram to the plaintiffs (Ex. 18). In this telegram they charged the plaintiffs with breach of conditions of the agreement of the 14th of February, 1920, and in consequence thereof intimated the rescission of the agreement in its entirety on their behalf. On the 10th of March, 1920, the plaintiffs replied by telegram repudiating the charges of breach of contract. It would appear from the contents of Ex. 19, which is a copy of a letter from the Tata Industrial Bank, Limited, to the plaintiffs, that the former were willing to accept the payment which was offered to be made in the plaintiffs' letter of the 3rd of March, 1920, (Ex. 12). At the hearing of the appeal no attempt was made on behalf of the defendants, to substantiate the charge of breach of contract contained in the telegram of the 9th of March, 1920, (Ex. 18). On these facts we must hold, therefore, that the plaintiffs were always willing and ready to perform their part of the contract as contained in the agreement of the 14th of February, 1920, and that indeed they offered performance of the same. We must further hold that the Pioneer Mills, Limted, had no justification in law to rescind the agreement just now mentioned. It follows that the agreement stands as a vaild contract between the parties. The plaintiffs' case is that the agreement in question entitles them to a charge, in the event of delivery, over the moveable assets of the Pioner Mills, Limited, and contains a promise to execute a mortgage in respect of immoveables, in consideration of any sum or sums advanced by the plaintiffs to the Pioneer Mills, Limited, within the maximum limit of 15 lacs of rupees. This case as just now stated raises the question of the interpretation of the agreement of the 14th of February, 1920, and to that extent it is a valid agreement even without registration. Neither the

interpretation which the plaintiffs place on that agreement nor the argument that the agreement interpreted as such does not require registration was contested by the respondents before us. On the construction of the agreement, therefore, we hold that it does create a charge in favour of the plaintiffs as regards the moveable assets, in the event of delivery, of the Pioneer Mills, Limited, and further it contains a promise on the part of the Pioneer Mills, Limited, to execute a mortgage in favour of the plaintiffs in respect of the immoveables of the Pioneer Mills, Limited, for the consideration of Rs. 1,50,000 which the Pioneer Mills, Limited, have received from the plaintiffs.

Having reached this conclusion the contention on the side of the plaintiffs is that as both the moveables and immoveables have since the institution of the suit been converted into ready money and are held by the liquidators in the shape of sale proceeds of the assets of the Pioneer Mills, Limited, the plaintiffs are entitled to a declaration that they are secured creditors or charge-holders as against the sale-proceeds to the extent of Rs. 1,50,000 and interest.

In support of the contention it was argued that had the immoveable assets of the Poineer Mills, Limited, been in existence to-day the plaintiffs would have been entitled under the terms of the agreement to compel the Pioneer Mills, Limited, in a suit for specific performance to execute a deed of mortgage in respect of such assets. On the side of the respondents this argument was sought to be negatived on two grounds: (1) That there could be no specific performance of a contract to lend or borrow and (2) that the provisions of s. 109 of the Indian Companies Act, 1913, would bar the relief of specific performance.

We are of opinion that the reply given on the side of the respondents is not adequate and that the plaintiffs' contention is right and must be accepted.

The question of the charge as against the sale-proceeds in so far as they represent the value of the moveable assets of the Pioneer Mills, Limited, is of minor importance. We were informed by the liquidators at the hearing of the appeal that out of the total amount of Rs. 9,85,000 the sale-proceeds held by the liquidators, only Rs. 9,000 represented the value of the moveables which have already been disposed of by them. The serious question for decision, therefore, is the claim of charge as against the sale-proceeds of the immoveable assets of the Pioneer Mills, Limited. As a broad proposition it may be accepted at once that it is settled in the Law of England that a promise to advance money in loan cannot sustain a suit for specific performance. The converse proposition that a promise to borrow money is not susceptible of specific performance is equally not open to any doubt—see *South African Territories Co.* v. *Wallington* (1). But in the events which have happened that proposition has no bearing on the determination of this case. In the first place, a promise to execute a mortgage of immoveable property in lieu of consideration advanced is a promise to transfer title in such property. Section 58 (*a*) of the Transfer of Property Act, 1882, defines a mortgage as follows:—

"A mortgage is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability."

The reason of the rule of law enunciated in the case of *South African Territories Co.* v. *Wallington* (1) is that damages furnish adequate relief in relation to a contract of loan. This was recognised by the Indian Legislature in the third illustration of s. 21 of the Specific Relief Act, 1877. In the Explanation to s. 12 of the same Act, however, we find the following provision:—

"Unless and until the contrary is proved, the Court shall presume that the breach of a contract to transfer immoveable property cannot be adequately relieved by compensation in money, and that the breach of a contract to transfer moveable property can be thus relieved" The nature of a mortgage transaction being what it is given in the definition quoted above it follows from what has been stated that specific performance of a contract to transfer immoveable property by way of a mortgage may be granted under cl. (*c*) of s. 12 of the Specific Relief Act, 1877. In the circumstances of this case it is abundantly clear and indeed it was not disputed that a relief by way of damages will not be an adequate relief.

(1) (1898) A. C. 309; 67 L. J. Q. B. 470; 78 L. T. 426; 14 T. L. R. 298; 46 W. R. 545.

A simple money-decree in favour of the plaintiffs will bring no fruits to them for the reason that almost the whole of the sale proceeds will be distributed amongst the secured creditors and nothing will be left to fall to the share of the plaintiffs as such decree-holders.

In the second place the prayer of the plaintiffs is not to obtain an order of execution of the mortgage by the Pioneer Mills, Limited, in consideration of money agreed to be advanced, but not till now advanced. In the case of that nature the promise of each party would be wholly executory while in the present case the promise on the part of the plaintiffs was performed when they paid the sum of Rs. 1,50,000 to the Pioneer Mills, Limited, and the latter accepted the payment. And further in the circumstances already set forth the genuine offer made by the plaintiffs to the performance of the rest of their promise must be regarded, in the eyes of law, as actual performance of it. The principle laid down by Rolfe, B., is now the rule of law in England and it is this:—

"Now, it may be observed, that in every contract by which a party binds himself to.....pay money to another, he in fact engages to do an act which he cannot completely perform without the concurrence of the party to whom.....the payment is to be made. Without acceptance on the part of him who is to receive, the act of him who is to...pay, can amount only to a tender. But the law considers a party who has entered into a contract to...pay money to another, as having, substantially, performed it, if he has tendered the...money to the party to whom the payment was to be made, provided only that the tender has been made under such circumstances that the party to whom it has been made, has had a reasonable opportunity of examining the...money tendered in order to ascertain that the thing tendered really was what it purported to be. Indeed, without such an opportunity an offer to...pay does not amount to a tender." *Startup* v. *Macdonald* (2). This principle is embodied in s. 38 of the Indian Contract Act, 1872, and, therefore, is the law in India as well. There is no question in the case that the plaintiffs had money enough to pay when they made the tender and that they were in a position to make it good. Therefore, the contract of loan stands wholly executed. The case thus ceases to be one of specific performance of a contract to lend or borrow money *simpliciter*.

By reason of the sale of the assets of the Pioneer Mills, Limited, under the order of the High Court at Calcutta in the liquidation proceedings the immoveable property belonging to the Pioneer Mills, Limited, has ceased to exist. Execution of a deed of mortgage in respect of it, therefore, has become impossible. The sale-proceeds have taken the place of that property and as against those proceeds we must hold that the plaintiffs have acquired a charge by operation of law to the extent of Rs. 1,50,000 and interest thereon at the rate of 8 per cent. per annum from the two dates of payments. That a charge would arise in such circumstances is beyond all doubt—*Barhamdeo Prasad* v. *Tara Chand* (3). As regrards the argument advanced on the side of the defendants-respondents and based on the provisions of s. 109, Indian Companies Act, 1913, much need not be said. Those provisions are only applicable to a "Mortgage or charge created.....by a Company." The charge arising in favour of the plaintiffs in the circumstances of this case is a charge by operation of law and not by a contract. Further if the decree which we propose to pass in favour of the plaintiffs is regarded as an instrument by which the "charge is created or evidenced" it will be open to the plaintiffs to take such steps as are provided for by s. 109 to make the charge effective.

On the above grounds we would grant a declaration to the plaintiffs that they are secured creditors to the extent of the sum of Rs. 1,50,000 plus interest as indicated above in relation to the sale-proceeds in the hands of the liquidator. The decree of the lower Court is, therefore, set aside and a declaration in terms stated above is granted to the plaintiffs. As to costs here and hitherto incurred we reserve our order for the present.

The Court below has disposed of the suit upon a preliminary point and the decree of that Court has been reversed by us in appeal. In the ordinary course we would have remanded the case to that Court under O. XLI, r. 23, of the C. P. C.,

(2) (1843) 6 Man. & G. 593; 64 R. R. 810; 7 Scott N. R. 269; 12 L. J. Ex. 477; 134 E. R. 1029.

(3) 21 Ind. Cas. 961; 41 I. A. 45; 15 M. L. T. 62; (1914) M. W. N 38; 12 A. L. J. 82; 18 C. W. N. 345; 19 C. L. J. 132; 16 Bom. L. R. 89; 26 M. L. J. 243; 41 C. 654 (P. C.).

but in the special circumstances of this case we prefer not to do so. The case was instituted on the 12th of February, 1923, and the decision came to be given on the 30th of April, 1925. This is a long time and we fear that if we entrust the case into the hands of the lower Court again the waste of time may be enormous. Under r. 28 of O. XLI of the Code, therefore, we propose to take such additional evidence in the case as the parties may desire to produce with respect to the issue or issues which remain still undecided and are in controversy. For this purpose we fix 22nd of November, 1926. Notice of this order will at once be served on the Counsel of the parties to the appeal.

SUPPLEMENTARY JUDGMENT.—*November 29, 1926.*—To-day this appeal again came up for hearing before us. Under our judgment of the 12th of November, 1926, we were to record the evidence, if any, on the issues which were not covered by that judgment and were left in controversy between the parties.

Mr. Bisheshwar Nath Srivastava, Advocate for the appellants, states as follows:—

"We want to produce evidence to prove that—

1. The Tata Industrial Bank, Limited, defendant No. 2;

2. Bilas Rai Hardat Rai, the original defendant No. 3 now represented by Lala Ram Narain, Radha Krishna, Ganga Prasad and Hari Prasad, and

3. Radha Kishen Motilal Chamaria, defendant No. 4, had notice of our agreement of the 14th of February, 1920, and of the advance of Rs. 1,50,000 which we made thereunder to the Pioneer Mills, Limited, previous to the mortgages in their favour respectively."

Mr. N. N. Sarkar Barrister-at-law on behalf of Radhakishen Motilal Chamaria, Rai Bahadur Babu Vikaramajit Singh, Advocate on behalf of the representatives of Bilas Rai Hardat Rai and Mr. Ram Prasad on behalf of the Tata Industrial Bank, Limited, state as follows:

"For the purpose of this case we admit that our clients respectively had knowledge of the plaintiffs' agreement of the 14th of February, 1920, and of the advance of Rs. 1,50,000 previous to the execution of the mortgages in favour of our clients respectively."

A ceriified copy of the mortgage in favour of the Tata Industrial Bank, Limited, dated the 10th August, 1922, is on the record of this appeal and has been accepted as sufficient evidence in lieu of the original Ex. D-3.

A certified copy of the mortgage in favour of Radhakishen Motilal Chamaria dated the 31st of August, 1922, is also on the record of this case and has been accepted in evidence as sufficient. It is Ex. D-2.

The original mortgage-deed in favour of Bilas Rai Hardat Rai dated the 10th August, 1922, is on the record of Appeal No. 73 of 1925, the arguments in which have just now been concluded and judgment reserved. With the consent of the parties it has been read as evidence in this case also.

The question as to whether the execution of the above mortgages should be treated as having been admitted or not by the plaintiffs in the pleadings of this case was discussed before us. Having regard to the statements made in para. 18 of the plaint we are of opinion that it must be held that for the purpose of this suit the execution of those mortgages has been admitted by the plaintiffs. We, therefore, did not call upon the parties relying on those mortgages to produce evidence in proof of them.

Now the Counsel for the plaintiffs and the defendants state that they do not desire to produce any evidence in the case and that the issues not covered by the previous judgment of the 12th of November, 1926, are issues Nos. 7, 8, 9 and 10, which may be decided forthwith by this Court.

As regards issue No. 7, the Counsel for the defendants state that they agree that the issue may be decided by the Court in favour of the plaintiffs.

We accordingly do so.

Issue No. 9 is covered by the statements of the Counsel of the parties recorded above. We accordingly decide it in so far as the question of fact involved in it is concerned in favour of the plaintiffs.

As to issue No. 10 in so far as it relates to the genuineness of the mortgages mentioned above and for the reasons stated above, we decide it in favour of the defendants. On the question of the validity of these mortgages no argument was advanced to show that any one of them was invalid in any respect whatsoever. We, therefore, hold that they are valid.

As regards issue No. 8, the plaintiffs' contention is that the agreement of the 14th of February, 1920, coupled with the fact that the plaintiffs did perform their part of the agreement creates a charge in equity in their favour as against immoveable property of the Pioneer Mills, Limited, as from the date of the performance, in other words, from the date of the advance of Rs. 1,50,000 made by them and inasmuch as the defendants had notice the plaintiffs' claim has priority over the mortgages of the defendants. We are unable to accept this contention. On the part of the Pioneer Mills, Limited, there was a promise to effect a mortgage in favour of the plaintiffs for the advance or advances that they might make under the terms of the agreement, as we have already held in construing the agreement. We are of opinion that such a contract does not create any charge or lien in India whatever might be the rule in England founded on the principle that equity considers that done which ought to be done. In India under the combined effect of the Transfer of Property Act, 1882, and the Indian Registration Act, 1908, no interest by way of a mortgage or charge in immoveable property could be created without a formal registered deed between the parties. The application of the rule of equity to the present case will contravene the rules of law as they exist in this country. We, therefore, reject the argument and hold that the plaintiffs are secured creditors of the Pioneer Mills, Limited, as we have already held but their claim as such has no priority against the mortgages of the three defendants mentioned above. To the declaration which we have already granted to the plaintiffs will be added the further declaration that they have no priority against the mortgages of the three defendants stated in details at the beginning of this judgment.

We also grant a decree to the plaintiffs for the recovery of the sum of Rs. 1,50,000 with interest at 8 per cent. per annum from the dates of payments to the date of realisation as against the liquidators subject to the mortgages—

(1) of the 31st of August, 1922, in favour of Radhakishen Motilal Chamaria, and

(2) of the 10th of August, 1922, in favour of Bilas Rai and Hardat Rai. The plaintiffs will also get their costs from the liquidators in both the Courts. Other parties will bear their own costs in the Court below as well as in this Court.

Before we take leave of this case we may point out that the mortgage of the 10th of August 1922 in favour of the Tata Industrial Bank, Limited, is of no practical consequence now in view of the fact appearing in the other appeal (First Civil Appeal No. 73 of 1925) that that mortgage has come to be merged in, or at any rate no claim is made on its basis independently of, the mortgage of the 31st of August, 1922, in favour of Radhakishen Motilal Chamaria. It will consequently serve no useful purpose to include it in the declaration which we have directed to be made in the decree following this judgment.

G. H.
A. N. A.

Appeal allowed.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 100 OF 1925.

January 25, 1926.

Present :—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

COX & Co.—PLAINTIFFS—APPELLANTS

versus

H. PESTONJI & Co.—DEFENDANTS—RESPONDENTS.

Negotiable Instruments Act (XXVI of 1881), s. 82—Bills of Exchange—Extension of time for payment, effect of—Bill, whether cancelled—Notes of clerk on bill, whether part of bill—Alteration of note, whether alteration of bill—Stamp Act (II of 1899), ss. 3 (b), 19, 35—Bill, admissibility of—Evidence—Opinion on question of law, relevancy of.

A bill is not cancelled by the mere fact that the holder has extended the time for payment in favour of the acceptor. [p. 490, col. 2.]

It does not follow that because a writing appears on the paper on which a bill is drawn, therefore, it becomes a part of the bill and constitutes a material alteration if at variance with the terms of the bill. [p. 492, col. 1.]

A note made by the holder's clerk as to the date according to the Calendar on which a bill is due for payment does not become a part of the bill and an alteration of that note on the time being extended cannot, therefore, be treated as an alteration of the bill for the purposes of stamp law. [p. 491, col. 2.]

The opinion of a witness on a question of law is irrelevant. [p. 492, col. 1.]

Appeal from the judgment and decree of Shah, J.

Messrs. *G. C. O'Gorman* (with him Messrs. *Coltman* and *Campbell*), for the Appellants.

Messrs. *B. J. Desai*, *Mulla* and *Kanga*, Advocate-General, for the Respondents.

JUDGMENT.—The plaintiffs filed this suit against the defendants to recover the amount due on forty-eight Bills of Exchange. These bills were drawn in England against certain shipments of goods which arrived in due course in Bombay. Twenty-five bills were drawn by Messrs. Royle and Binns, twenty by Davies Black and Co., Ltd.; and three by Wilkinson and Warburton, Ltd., and they were all negotiated in London through Messrs. Cox and Co., who sent the bills to Bombay to be collected by their branch office. According to the particulars B, D and F to the plaint the bills were all accepted by the defendants and were duly presented on their respective due dates to the defendants for payment, but were dishonoured, and by mutual consent the time for payment was extended to the times mentioned in the said particulars. In spite of the extensions of time so granted the defendants failed to make any payments on the bills, except the sum of £ 274-12-10 mentioned in the particulars to the plaint. Accordingly, the plaintiffs sued to recover the amount of Rs. 4,24,995-8-0 with further interest from December 16, 1922, till judgment and costs of the suit and interest on judgment at the rate of six per cent. per annum till payment.

Various contentions were raised by the defendants in their written statement, but at the trial issues were raised not only on the pleadings but also on certain other questions not raised in the pleadings. Arguments were heard on the latter issues, which were decided in favour of the defendants with the result that the suit was dismissed with costs.

For the purposes of this appeal the only issues are:—

(1) Whether the bills drawn by the three firms already mentioned were duly stamped and admissible in evidence?

(2) Whether if any of the bills were admissible in evidence, they were not affectively cancelled?

On the first question as to whether the Bills of Exchange were duly stamped and admissible in evidence, the Judge held that thirty-seven of the bills were inadmissible, because material alterations had been made on them, and, therefore, they became new instruments which required to be stamped under s. 3 (*b*) of the Indian Stamp Act.

With regard to the eleven bills on which there had been, in the opinion of the learned Judge, no material alteration, he held that they were admissible in evidence but that, as the due dates had been altered, they were effectively cancelled, and there being no new bills available on which to base the suit, the plaintiffs' claim should fail with regard to those bills also.

If the defendants' argument is correct, that, because the holders extended the time for payment in favour of the acceptor, the bills were cancelled, then it would make no difference whether the fact of the extension of time for payment was entered on the bills or not. We cannot agree that the eleven bills, on which there was no material alteration on the face of them, were cancelled, merely because the time for payment was extended. Section 82 of the Negotiable Instruments Act defines in what way the maker, acceptor or indorser of a negotiable instrument is discharged from liability thereon. And, it cannot be said that when on the due date the acceptor asks for further time, and the holder gives him further time, the liability of the acceptor is thereby discharged.

The case of *Reed* v. *Deere* (1), relied upon by the respondents, is not applicable to the present facts. It was held in that case that where a party declared upon the two written agreements, by the second of which variations were made in the first, and there were also counts upon each separately, and it appeared, when the instruments were produced in evidence by the plaintiff, that the first only was stamped, the second could not be used in evidence to support the plaintiffs' case, but might be looked at in order to ascertain whether the first was altered by it, and that, therefore, the plaintiffs could not exclude the second agreement and proceed upon the counts setting out the first only. In the judgment reference was made to the decision in *French* v. *Patton* (2) that if the parties to an agreement, after they have signed it, introduce an alteration which cannot be read in evidence for want of a stamp, the old agreement is at an end. The principle involved in all these cases

(1) (1827) 7 B. & C. 261; 2 C. & P. 624; 31 R. R. 190; 108 E. R. 720.

(2) (1808) 1 Camp. 72; 9 East 351; 9 R. R. 571; 103 E. R. 606.

depends on (1) whether there are two or more agreements one of which is unstamped, or (2) whether there is an alteration of the original agreement.

Then the question remains whether the thirty-seven bills are inadmissible in evidence as not being duly stamped. The bills were drawn in the usual form payable so many days after sight, and after acceptance by the defendants, a calculation was made by the plaintiffs' clerk in order to ascertain on what date the bills fell due, and a note was made in a corner of each bill of that date. When further time was given to the defendants, that date was struck out and the date synchronizing with the further time given to the defendants was entered, and the same process was gone through when time was again extended.

The first question is whether by entering those dates on the bills there was a material alteration effected. It is conceded that, if on the face of the bill as drawn, there is any material alteration, under the provision of s. 87 of the Negotiable Instruments Act, the bill is not avoided against the defendants who authorised or assented to the alteration, but it is argued that even if the bill is not avoided under the Act, the alteration avoids the bill under the stamp laws by making it a new instrument which requires a fresh stamp.

The defendants relied upon the decision of Mr. Justice Kajiji in their favour in *International Banking Corporation* v. *Pestonji & Co.* (3). The appellants do not dispute the correctness of the decision on the facts of that case, because the relative bills, after the time for payment had been extended, were represented to the defendants for acceptance and the defendant re accepted them. But, apart from that, the learned Judge was of opinion that there had been a material alteration in the bills when the due dates as originally calculated by the plaintiffs' clerk and entered in a corner of the bills had been altered so as to coincide with the dates to which payment had been extended. The learned Judge said (page 33)*:—

"But it is no body's case here that it was intended from the very beginning that the time of payment should be seven months after sight. Therefore, the alteration from ninety days to four months after the due date is not altered because it was a mistake but it is altered in consequence of a new arrangement arrived at between three parties, *viz.*, the drawers, the Bank and the acceptor. But it is urged that on the face of it there is no alteration, that is to say, that the words 'ninety days after sight' are not struck out and there is no alteration on the face of it, and the due date in red ink which is put on the top of the bill on the right-hand side is made by the Bank in Bombay simply for their own convenience, and it is a mere memorandum, and, therefore, that does not amount to an alteration on the face of it. I see no force in this argument. In my opinion it amounts to an alteration. It is every body's case that ninety days were extended to four months after the first due date. Whether the red ink memorandum on the top of the bill of the second due date was there or not it makes no difference. I believe the evidence of Mr. Bremmer that it was not there when the bills were presented for re-acceptance. Every body knew that the date of payment of these Bills of Exchange was extended by four months from the first due date. It must be held, under these circumstances, that the original bill was extinguished and a new bill was substituted in its place which was re-accepted and the due date of it was four months after the first due date."

We cannot agree with that argument, which is really based on the assumption that as soon as the holder's clerk makes a calculation according to the calendar as to the date at which the bill is due for payment, and notes that calculation on the bill, that note becomes part of the bill. It is sufficient to say that that is not the case. If it were, it would follow that the clerk, by making a wrong calculation and noting a wrong date, would thereby create a new instrument, which would require to be stamped.

The appellants relied upon the case of *Fanshwe* v. *Peet* (4). In that case the defendants pleaded a set-off by the Bank as indorsees of a Bill of Exchange for £391-1-7 drawn by the plaintiff, payable four months after date, on Begbie, Wiseman and Co., and accepted by them and afterwards dishonoured. The bill was drawn on Septem-

(3) 86 Ind. Cas. 115; 27 Bom. L. R. 31; A. I. R. 1925 Bom. 187; 49 B. 351.

*Page of 27 Bom. L. R.—[*Ed.*]

(4) (1857) 24 L. J. Ex. 314; 2 H. & N. 1; 5 W. R. 489; 157 E. R. 1; 115 R. R. 395.

ber 8, 1856, and would, accordingly, fall due on January 11, 1857. As the 11th was a Sunday it was presented on the 10th. The acceptors had signed below the following endorsement :—

"Accepted payable at Messrs. Overrend, Gurney & Co., London No. 1,756. Due 11th December, 1856."

Pollock, C. B., said (page 315*):—

"The words 'Due 11th December, 1856' appear to be a mere memorandum by a clerk or some person who prepared the bill for the acceptor's signature. The acceptance of the bill is general according to its tenour."

Bramwell, B., said (page 315*) :—

"I entirely agree with the decision of my brother Martin at the trial, whether the question be one of fact or law. The bill is drawn at four months, and that bill is accepted. The figures inserted amount simply to an untrue statement of when the bill, as drawn, is payable."

That case sufficiently shows that it does not follow, that because a writing appears on the paper on which the bill is drawn, therefore, it becomes a part of the bill and constitutes a material alteration if at variance with the terms of the bill. If the original entry made by the clerk was not part of the bill, but merely a memorandum, then any alteration in the memorandum could not possibly be treated as an alteration of the bill. The Judge seems to have attached some importance to the statement of the witness Kaikhushru, the plaintiffs' Head Clerk, to the effect that the due date as noted in the corner of a bill was an essential part of the instrument, but the opinion of the witness on a question of law would be irrelevant. In our opinion, therefore, these dates entered by the plaintiffs' clerk in the corner of the bills did not become part of the bills which still remained as they were drawn payable at so many days after sight. The extraordinary results which would follow if the defendants' argument that the bill, if not avoided under the stamp laws were cancelled, were to succeed, can easily be shown by a simple illustration. "A bill is drawn on *A* and accepted by him, due on a certain date. On the due date *A* goes to the holder and asks for further time; the holder says: 'You may pay in a week.' The bill is cancelled. *A* is released from his liability under his acceptance." If this were sound law the whole course of dealing between merchants and Banks would have to be re-considered.

In our opinion, therefore, the appeal succeeds and the case must go back to the lower Court for trial on the remaining issues. The plaintiffs will be entitled to the costs of the appeal and the costs in the lower Court on these issues.

A. N. A. *Appeal allowed.*
Case remanded.

*Page of (1857) 24 L. J. Ex.—[*Ed.*]

PATNA HIGH COURT.

LETTERS PATENT APPEAL No. 34 OF 1926.
October 27, 1926.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Jwala Prasad.

KALYANDAS ADHIKARY AND OTHERS—PLAINTIFFS—APPELLANTS

versus

JYOTI LAL PATAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Chota Nagpur Tenancy Act (VI of 1908), ss. 80, 81, 84—Record of Rights—Entry of status of occupant as mortgagee—Presumption of correctness of entry—Proper particulars to be entered in record, nature of—Burden of proof of showing that particular was not required.

Any particulars appearing in the Record of Rights which are specified in the order made under s. 80 of the Chota Nagpur Tenancy Act are proper particulars to be recorded in the record whether they come within the different classes mentioned in s. 81 or whether they are in addition thereto. [p. 494, col. 1.]

Though there is not in terms any direction in the Act that an occupant holding as a usufructuary mortgagee shall be described as such it is usual to find in the Record of Rights in Chota Nagpur and in Bengal entries of that nature describing the nature of the possession of the occupant and under s. 81 of the Act particulars of that sort would be perfectly proper particulars to enter in the Record of Rights if they are specified in the order made under s. 80. [*ibid.*]

The ordinary rule with regard to official documents such as the Record of Rights being that they must be presumed to be correct until the contrary is shown, it must be presumed that the entries made in the Record of Rights are those entries and those entries only which are required to be made in the order passed under s. 80 and if a person wishes to dispute the validity of an entry, on the ground that the particulars entered were not in fact required the onus would be upon him to produce the order passed under s. 80. [p. 494, col. 2.]

Letters Patent Appeal against a judgment of Mr. Justice Adami, dated the 10th March, 1926, affirming a decree of the District Judge, Manbhum, dated the 20th March, 1923, reversing that of the Munsif, Purulia, dated the 20th November, 1922.

Mr. *A. K. Roy*, for the Appellants.

Mr. *S. C. Mazumdar* for Mr. *M. L. Bannerji*, for the Respondents.

JUDGMENT.

Miller, C. J.—This is an appeal under the Letters Patent from a decision of Mr. Justice Adami affirming a decree of the District Judge. The suit was instituted by the plaintiff claiming to redeem from the defendant No. 4, Jyoti Lal Patar, certain lands in *Mouza* Chipida which had been mortgaged by the plaintiffs on the 5th April, 1903. Although there was some dispute at the trial as to whether these lands had ever been in the possession of the plaintiffs at all, it is proved beyond all dispute and accepted by all the Courts that the land was settled with the plaintiff or his predecessors many years ago by the predecessor of the defendant No. 4. The defendant No. 4 is the *ghatwal* of the land in question. The 1st defendant, Chaitan Mahto, is the mortgagee to whom the plaintiff mortgaged the land in 1903. The land consisted of two plots and carried a rental of Rs. 10. The portion which was mortgaged is said to have carried a proportionate rent of Rs. 6. The mortgage was a usufructuary mortgage and was redeemable upon paying the mortgage-money Rs. 99, in *Jeth* of any year. The land accordingly might be redeemed upon paying the mortgage-money at any time within 60 years of the date of the mortgage. What happened was, according to the plaintiffs' case, that the plaintiffs' predecessors had advanced certain money to the grandfather of the 4th defendant who was at the time the *ghatwal* of the village and that money was re-payable by certain instalments equivalent to the amount of rent of this holding and by the year 1309 *B. S.* if the instalments were paid the debt would be discharged. The arrangement was that the rent due from the tenant should be set off against the amount due to him under the loan to the *ghatwal*. Therefore in 1309 rent in fact became payable to the landlord by the plaintiff for this holding. He appears, however, for some reason or another, to have been unable to pay the rent with the result that he mortgaged a portion of the land as I have already stated and with regard to the balance, the rental of which would be about Rs. 4 or Rs. 4-8-0, he made a surrender of that to the landlord. The rent of the mortgaged portion would, of course, be payable by the mortgagee. Therefore the plaintiff would not be liable for that rent assuming, of course, that the mortgagee paid it. So matters went on until the year 1921 when the plaintiff deposited the money in Court under s. 83 of the Transfer of Property Act and claimed possession of the property. He was, however, too late in depositing the money and was unable to get possession at that time. In the following year, however, he again deposited the money in *Jeth* and the money being refused he brought the present suit to recover the property.

The main question for determination in this suit was whether the plaintiff had mortgaged this property to Chaitan Mahto and whether Chaitan Mahto had at a subsequent date, that is, in or about the year 1314, transferred his mortgage interest to the defendant. Admittedly the defendant was in possession of the property. He claimed, however, that he was in possession not under any mortgage. In fact he denied altogether the mortgage itself and the transfer of the mortgage right to him and his case was that he and his grandfather the previous *ghatwal*, had been in possession of this property all along.

The learned Munsif found the facts in favour of the plaintiff and granted him a decree for possession of the land in suit.

On appeal the District Judge, although he found that the defendant's story was not true that he had been in possession as *ghatwal* all along, came to the conclusion that there was no reliable evidence to support the view that the defendant was in possession as mortgagee, and as he had been in possession for more than 12 years he had acquired a title against the plaintiff. He further found that the plaintiff had admitted in a previous suit that he had been dispossessed from the entire *jote* by the grandfather of the defendant No. 4 in the year 1314 and, therefore, that in any case if the plaintiff had been dispossessed of his property by the defendant's predecessor, then the plaintiff more than 12 years later could not sustain a suit for recovery of the land.

The case came on appeal to this Court and was decided by Mr. Justice Adami who dismissed the appeal.

The main point which has been argued before us is that the learned District Judge improperly rejected the evidence of the Record of Rights prepared under ss. 80 and 81 of the Chota Nagpur Tenancy Act. The

Record of Rights contains an entry to the effect that the defendant was in possession of the land in suit as a mortgagee under a transfer of the original mortgagee's rights and if that is accepted as evidence in the case, then there is a statutory presumption of its correctness until it is proved by evidence to be incorrect; see s. 84, sub-s. (3) of the Chota Nagpur Tenancy Act. The learned District Judge, however, rejected this evidence on the ground that the entry describing the nature of the defendant's possession was not such an entry as was required to be made in the Record of Rights under the provisions of s. 81 and, therefore, was something which did not come under the provisions of s. 84, sub-s. (3) of the Act. Section 80 provides that the Local Government may make an order directing that a Survey be made and a Record of Rights prepared in respect of the lands in any local area, estate or tenure or part thereof and the manner of preparing the record is prescribed in the Act. Section 81 provides that where an order is made under s. 80 the particulars to be recorded shall be specified in the order and may include either without or in addition to other particulars some or all of the following, namely, (then follow) a number of matters which may be set out in the Record of Rights. The first of these is the name of each tenant or occupant. There is not in terms any direction that an occupant holding as a usufructuary mortgagee shall be described as such, but it is certainly usual to find in the Record of Rights in Chota Nagpur and in Bengal entries of that nature describing the nature of the possession of the occupant, and as I read s. 81 particulars of that sort would be perfectly proper particulars to enter in the Record of Rights if they were specified in the order made under s. 80, for s. 81 provides that the particulars to be recorded shall be specified in the order and they may include either without or in addition to other particulars some or all of the following, namely, those set out which I have already referred to in the latter part of the section. It is clear, therefore, that any particulars appearing in the Record of Rights which are specified in the order made under s. 80 are proper particulars to be recorded in the record whether they come within the different classes mentioned in s. 81 or whether they are in addition thereto. The learned District Judge (and the same view was taken by Mr. Justice Adami) considered that no presumption of correctness attached to this entry under s. 84 of the Chota Nagpur Tenancy Act, because the entry was not one of the particulars for the recording of which sanction is given by s. 81 of the Act. He further pointed out that the entry itself was incorrect in one particular, namely, that it gave the rent of the land as Rs. 10 whereas it should be Rs. 6. Assuming for a moment that the entry of Rs. 10 was incorrect, although it was in fact apparently the amount of the rent payable for the whole holding, still this does not appear to me to have any bearing on the present question, namely, whether the defendant was holding the land as mortgagee or in some other capacity. It may well be that the rent of this particular land ought to have been described as Rs. 6 and by some mistake the rent of the whole holding, namely, Rs. 10 was put in, but that does not seem to me to detract in any way from the value of the remaining part of the entry. It is said that as the order made under s. 80 specifying the particulars that shall be recorded has not been produced by the plaintiff it cannot be said that the particulars relied upon by him are such as were contained in the order and, therefore, the statutory presumption referred to in s. 84 cannot apply. I cannot take this view. The ordinary rule is, with regard to official documents of this nature, that they must be presumed to be correct until the contrary is shown, that is to say, it must be presumed that the entries made in the Record of Rights were those entries and those entries only which are required to be made in the order passed under s. 80, and had the defendant wished to dispute the validity of the entry, then I think the onus would be on him to produce the order passed under s. 80 to show that these particulars were not in fact required. It seems to me, therefore, that the learned District Judge shut out a most valuable and cogent part of the evidence in favour of the plaintiff. Taking this view it seems to me that there are two courses open to us, either we may send the case back to the District Judge to consider again the evidence in the light of this entry in the Record of Rights which carries with it a statutory presumption as to its correctness until it is proved by evidence to be incorrect. On the other hand, we may look into the evidence which is before us and is very short and consider whether there is in fact

on the record in this case any evidence at all which may be taken as rebutting the presumption arising from the Record of Rights. We have looked at the evidence and we have asked the learned Vakil for the respondents to point to any evidence which could be taken as rebutting the evidence of the Record of Rights, but he has been unable to do so and we ourselves have been unable to find any such evidence on the record. In the circumstances, therefore, I think it would be simply a waste of time to send the case back for further consideration of this point. The Record of Rights, in the absence of any rebutting evidence, must be taken as conclusive of the status of the defendant, that is to say, that he was holding this land not as a proprietor in his capacity of *ghatwal* but as a mortgagee.

The only other point which was raised in appeal on behalf of the respondent was that it was said that the plaintiff had himself surrendered to the *ghatwal* not only that part of the property which had been mortgaged but also at some subsequent date the remaining portion of his holding which had not been mortgaged, and if this were so, then, of course, he could not seek to recover back the property which he had surrendered. It was not put exactly in that form by the learned District Judge but it was, I think, put in that form by Mr. Justice Adami when the case came up before him in second appeal, and I may say that having looked at the evidence given by the plaintiff in the present suit and in the deposition given by him in the previous suit there has been some misapprehension as to what the witness actually said. I cannot find in either of these depositions that he ever said that he surrendered to the defendant any portion of the land except that which, in fact, had not been mortgaged. It is true that in one place he does say that he was dispossessed of the remaining portion of the land, that is to say, the mortgaged part, by the defendant. His evidence was, no doubt, given in Bengali and what the terms he used exactly were and which were translated as being dispossessed of the remaining land it is not possible now to ascertain, but it is perfectly clear to my mind, taking his evidence altogether, both that which he gave on the previous occasion and that which he gave on this occasion that what he meant was that it was in the year 1314 *B.S.* that the defendant got possession of the remaining land and although the date is given differently in different places that was the date given in one place by the plaintiff as that on which the mortgage right was transferred to the defendant by the original mortgagee Chaitan Mahto. Moreover, it is very difficult to see how the plaintiff could be dispossessed of the mortgaged land of which he was not in possession and, in fact, was, not entitled to be in possession at that time, and I have no doubt whatever that what the witness meant was that it was on that occasion that the defendant got possession of this mortgaged land. Therefore, it seems to me that the second point of dispossession or surrender, whichever way you look at it, is not made out on behalf of the defendant. For these reasons it seems to me that the decision of the learned Judge of this Court and of the District Judge must be set aside and the appeal allowed with costs here and in all the Courts below and the decree of the Munsif should be restored.

Jwala Prasad, J.—I agree.

A. N. A. *Appeal allowed.*

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 114 OF 1925.

February 17, 1926.

Present :—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

P. S. RAMANUJACHARY—APPELLANT—APPLICANT

versus

POHOOMAL BROS.—PLAINTIFFS—RESPONDENTS.

C. P. C. (Act V of 1908), O. XXX, rr. 2, 3 O. XXXVII, r. 2—Suit against firm—Service on partner—Party served denying partnership—Procedure—Issues—Summary suit on negotiable against firm, procedure relating to—Partnership—Dissolution—Burden of proof.

Where a person who has been served with summons as a partner enters appearance under protest denying he is a partner, the appearance has nothing to do with the merits of the case but only with the question whether the summons has been properly served according to the rules. Its effect is merely to nullify the service altogether as regards the defendant firm. The plaintiff may then disregard the appearance under protest and proceed again in his endeavours to serve the summons in accordance with

the provisions of r. 3. If he succeeds in doing this and obtains judgment against the firm he may apply under O. XXI, r. 50, for leave to issue execution against the person who had appeared under protest, when, if the liability is still disputed, the Court may order the liability of such person to be tried and determined in any manner in which any issue in a suit may be tried and determined. Or, the plaintiff may wish to challenge at once the denial of the person served as a partner that he was a partner. If so, he should take out a summons to strike out the appearance entered on the ground that the party appearing is a partner in the firm sued or was a partner at the time the cause of action accrued, or, in the alternative, to strike out of such appearance the denial of partnership. An order may then be made directing an issue to be tried to determine the question of partnership. [p. 497, col. 2.]

The only question in such cases being whether a person has been properly served as partner of the defendant firm, the question whether he has held himself out as a partner can never arise as that question relates to the liability of a person who in fact is not a partner. [*ibid.*]

A defendant entering appearance under such a protest in a suit filed under O. XXXVII, C. P. C., is not entitled to ask for the trial of an issue whether he is a partner. [p. 498, col. 1.]

Where a partnership has come into existence for a fixed period with a clause enabling one partner to dissolve by giving six months' notice to the other, any other method of dissolution by agreement between the parties must be strictly proved. [p. 499, col. 2.]

Appeal from the judgment and decree of Mr. Justice Mirza.

Mr. *Kanga*, Advocate-General (with him Mr. *Coltman*), for the Applicant.

Mr. *B. J. Desai*, (with him Sir *Thomas Strangman*), for the Respondents.

JUDGMENT.

Macleod, C. J.—The plaintiffs filed this suit against Messrs. Charry and Charry, a firm, to recover the sum of Rs. 2,500 with interest thereon said to be due on a promissory note dated November 2, 1923, which had matured on January 10, 1924. Under the provisions of O. XXXVII, r. 2, a summons was issued in accordance with form No. 4 of Appendix to the First Schedule of the C. P. C.

Thereupon one P. S. Ramanujachary applied for an order that leave should be granted to him to appear and defend the suit, or, in the alternative, to appear and defend the suit to the extent that he was not a partner at any time material to the suit and was not liable for the plaintiffs' claim. In his affidavit in support of the summons the applicant alleged that the partnership between himself and T. S. Varadachary in the firm of Charry and Charry was dissolved by mutual consent so far back as April 18, 1923.

The following order was made by the Chamber Judge on March 20, 1924, on the summons, after hearing the parties and reading numerous affidavits:—

"I do order that the applicant be and is hereby given leave to appear and to contend that he was not a partner in the firm of defendants at any time material to that suit and I do further order that the said issue be tried in Court on June 24, 1924."

For some reason not known to us it was not until September 21, 1925, that the case came on before Mr. Justice Mirza for trial of the issue. A question was first argued regarding the effect of the order of March 20, 1924. Mr. Coltman for the applicant contended that the only issue the Court was competent to try was whether the applicant was or was not a partner at the date of the *hundi* in suit. The learned Judge ruled that, although that might be regarded as the issue before him, it should be open to the plaintiff to contend that in case the applicant was not a partner at the date of the *hundi* he held himself out to be such and was hence liable to the plaintiffs. He further ruled that it should be open to the plaintiffs to contend that the applicant should be held liable for the amount of the *hundi* on the ground that the amount had gone towards payment of a liability incurred while the partnership was in subsistence and the plaintiffs were entitled on the principle of subrogation to stand in the shoes of the creditors of the partnership who were paid off by means of the amount so borrowed. The Judge further remarked that the procedure adopted by the order of March 20, 1924, was defective inasmuch as the issue was the only issue in the case and it should have been tried at the hearing of the suit and not as a preliminary issue. But he failed to observe that as yet no leave had been obtained to defend the suit. Thereupon he allowed the trial of the issue to proceed upon three grounds: (1) that the applicant was a partner at the date of the *hundi*, (2) that if not he was liable as having held himself out to be such, and (3) the applicant was liable to the plaintiffs in respect of the debt on the principle of subrogation. The last point was abandoned early in the trial by plaintiffs' Counsel.

On the evidence recorded the Judge held that the partnership was in existence at the date when its credit was pledged by means of Ex. O, the *hundi* in suit

of November 2, 1923. It was, therefore, not necessary to consider whether the applicant had held himself out as a partner. Still the question was considered at some length and the Judge expressed the opinion that at the date of the *hundi* the applicant was not in the position of a dormant partner and that he had held himself out as a partner of the firm.

The applicant has appealed.

As, with all due respect to the learned Judge, there has been a failure to appreciate the provisions of O. XXX with regard to suits filed against partners in the name of the firm and the complications which result when such a suit is also filed under the provisions of O. XXXVII, it becomes necessary, in the first instance, to set out clearly what is the procedure prescribed by those orders and explain how effect is to be given to it.

By r. 1 of O. XXX "Any two or more persons claiming or being liable as partners and carrying on business in British India may sue or be sued in the name of the firm (if any) of which such persons were partners at the time of the accruing of the cause of action."

Rule 3 prescribes that " Where persons are sued as partners in the name of their firm, the summons shall be served either—

(*a*) upon any one or more of the partners, or

(*b*) at the principal place at which the partnership business is carried on within British India upon any person having, at the time of service, the control or management of the partnership business there,

as the Court may direct; and such service shall be deemed good service upon the firm so sued, whether all or any of the partners are within or without British India."

In this case the summons was served upon the applicant as a partner.

By r. 6 "Where persons are sued as partners in the name of their firm, they shall appear individually in their own names, but all subsequent proceedings shall, nevertheless, continue in the name of the firm."

By r. 8 "Any person served with summons as a partner under r. 3 may appear under protest, denying that he is a partner, but such appearance shall not preclude the plaintiff from otherwise serving a summons on the firm and obtaining a decree against the firm in default of appearance where no partner has appeared."

What is the true legal position when a person who has been served with a summons as a partner enters an appearance under protest denying he is a partner, has not clearly been understood in this case. Such an appearance has nothing to do with the merits of the case, but only with the question whether the summons has been properly served according to the rules. Its effect is merely to nullify the service altogether as regards the defendant firm. The plaintiff may then disregard the appearance under protest and proceed again in his endeavours to serve the summons in accordance with the provisions of r. 3. If he succeeds in doing this and obtains judgment against the firm he may apply under O. XXI, r. 50, for leave to issue execution against the person who had appeared under protest, when if the liability is still disputed, the Court may order the liability of such person to be tried and determined in any manner in which any issue in a suit may be tried and determined. Or the plaintiff may wish to challenge at once the denial of the person served as a partner that he was a partner. If so, he should take out a summons to strike out the appearance entered on the ground that the party appearing is a partner in the firm sued or was a partner at the time the cause of action accrued, or, in the alternative, to strike out of such appearance the denial of partnership. An order may then be made directing an issue to be tried to determine the question of partnership.

It is to be noted that in such a case the only question depending on the determination of the issue is whether the summons has been duly served or not under r. 3. If it has, then the trial of the suit can proceed. If it has not, the plaintiff must proceed to serve the summons afresh. It should be obvious, then, that when the only issue for the determination of the Court is whether a person has been properly served as a partner of the defendant firm, the question whether he has held himself out as a partner can never arise, as that question relates to the liability of a person who in fact is not a partner, so that service on such a person cannot be good service on a firm under r. 3. A difficulty, however, arises where a suit is filed against a firm under the provisions of O. XXXVII which differ from the provisions in the rules of

the Supreme Court relating to summary suits. Such suits in England are instituted by means of a specially endorsed writ under O III, r. 6 and after the writ has been issued the plaintiff can take out a summons for judgment under O. XIV. The defendant can then ask for leave to defend. Under O. XXXVII, r. 2, C. P. C., the defendant cannot even appear without leave, and it would seem that the words "appear or" in O. XXXVII, r. 2 (2) are unnecessary and might well be omitted.

In England, an appearance under protest entered by a person served as a partner is not sufficient to ground proceedings under O. XIV, and this further emphasises the fact that such an appearance merely opens up the question whether the summons has been properly served and has nothing to do with the questions which will arise at the trial of the action.

When the applicant took out the summons in this case, it was probably necessary for him to apply for leave under O. XXXVII, r. 2, before his appearance under protest could be filed, and that could be the only question for the Judge to decide. The plaintiff might have allowed the appearance to be filed and then disregarded it as I have already pointed out, or he might have asked the Judge to direct the trial of an issue as to whether the applicant was or was not a partner at the time the cause of action accrued. If that issue were decided against him, there would be no good service against the firm. If he succeeded, then the summons would have been properly served and it would be only after that question had been settled, that it would be possible to consider the question whether leave to defend should be granted. In any event the defendant entering an appearance under protest could not be entitled to ask for the trial of an issue whether he was a partner. It does not appear from the record in what circumstances the order of March 20, 1924, came to be made, whether the plaintiff was told that he had an option to disregard the denial of partnership by the applicant, or whether he asked the Court to direct the trial of the issue, but the order as it stands could only relate to the question of the service of the summons on the defendant firm, and it is on that footing that I am dealing with this appeal. It would appear from the judgment before us that another summary suit No. 483 of 1924 was filed against the firm of Charry and Charry in which, on a similar application by the present applicant, a similar order was made in Chambers directing the trial of an issue whether or not the applicant was a partner in the firm of Charry and Charry at the time the cause of action in that suit accrued and Mulla, J., trying the issue held that the partnership was dissolved on May 21, 1923. The learned Judge also considered another issue, wrongly as I have already pointed out, whether there was a holding out by the applicant after that date. It is now possible to deal with the question whether the applicant was a partner in Charry and Charry on the 2nd November, 1923, the date of the *hundi* in suit.

The applicant and Varadachary entered into partnership on February 27, 1922. The partnership deed is Ex. E. The partnership was to continue for a period of five years unless it was determined by six calendar months, notice to be given by one partner to the other. Disputes arose between the partners regarding the conduct of the business, and on April 10, 1923, the applicant wrote to Varadachary a letter which concluded:—

"Under these circumstances please take formal notice not to do any more fresh business under the signature of Charry and Charry until the present misunderstandings are cleared and until I again give my consent to proceed with the normal business."

Varadachary replied on April 18 by a letter in which he said:—

"I have taken notice of your wishes and no business will be done in the name of Charry and Charry from to-day. I shall attend to the winding up of everything and then if approved we shall think of continuing the business."

Then, after referring to the accounts which were not yet made up, he stated that he was willing to pay the applicant in full the amount he had paid and release him from the deed of partnership, indemnifying him from all claims in respect of contracts still pending. The applicant replied on April 25, 1923, noting that Varadachary agreed not to do any fresh business and reserving to himself the option of going out of the partnership on being paid all amounts due to him as revealed by the accounts up to April 18, 1923. When the applicant received the amounts he wrote on May 14 that he had decided

to accept the offer of April 18, and withdraw from the partnership on being paid Rs. 13,625-6-3 standing to his credit in the books and on being given an indemnity against all contracts then pending.

Varadachary replied on May 21 that he was willing to pay whatever shown by the accounts and not the sum of Rs. 13,625-6-3.

The applicant replied on May 27, asserting that he had accepted the terms of settlemant suggested by Varadachary in his letter of April 18, practically in his own words by the letter of May 14, up to which time the terms of settlement had neither been withdrawn nor in any detail amended.

Thereafter there was no business correspondence between the parties except a letter by the applicant of June 12, 1923, stating that Varadachary had sent no reply to his letter of May 27, regarding a settlement out of the partnership and adding without prejudice to the writer's claims and contentions that he had asked Fergusson and Co., to scrutinise the accounts and vouchers on his behalf. On December 22, 1923, a deed of dissolution was drawn up reciting that the partnership had been dissolved from April 18, 1923.

It was strenuously contended that the two *hundies* drawn by Varadachary on April 20, 1923, which he signed as follows:—

"T. J. Varadachary,
Proprietor, Charry & Charry"

proved that there had been a dissolution of the partnership on April 18, but it is quite clear, on the applicant's own showing, that at the highest there was in existence, on April 20, only an offer by Varadachary which was not accepted by him before May 14. The question whether the firm could be liable on the *hundies* so drawn by Varadachary would be entirely irrelevant to the present issue.

The partnership having come into existence for a fixed period with a clause enabling one partner to dissolve by giving six months' notice to the other, it is clear that any other method of dissolution by agreement between the partners must be strictly proved. If the applicant had said in his letter of April 25, "I shall wait until I see the accounts before deciding whether to accept your offer of April 18," *viz.*, to pay the 12,000 odd which had been advanced by the applicant to the partnership, it might be said that the applicant was entitled to decide finally to accept the offer if it had not been previously withdrawn, but it is contended that the applicant, instead of keeping Varadachary's offer open, made a counter-offer stating that when the accounts arrived he would decide whether he would go out on being paid, not the 12,000 odd, but what would be due to him as revealed by the accounts, which meant due to him on account of his share in the partnership. The learned Judge says that the applicant, when he received the accounts from Varadachary, after he wrote on April 25, discovered that he was indebted to the extent of Rs. 2,500 before he wrote his letter of May 14, but I cannot discover anything in the record which would show that the applicant knew what was the loss incurred until he received Messrs. Fergusson & Co.'s report of July 12. In cross-examination he said (page 57):—

"In June Fergusson and Co. were appointed to examine the accounts. There was Rs. 55,900 outstanding bills. I knew this from the report for the first time."

It is extremely difficult, therefore, to say what is the proper construction to put on the applicant's letter of April 25. It has been construed already by two Judges in two different ways and there is much to be said in favour of both views.

The conclusion I have come to is that, since the onus lies on the applicant to prove that he ceased to be a partner long before the *hundi* in suit was passed, he must prove unequivocally that the partnership, which, according to the terms of the deed, was still in existence, had determined by agreement between the parties, and if the documents on which he relies to prove that agreement can with equal justification be read as having two different meanings then the applicant has failed to satisfy the onus which lay upon him. The result is that the service on the applicant was good service on the firm and the appeal must be dismissed with costs.

Coyajee, J.—I agree.

A. N. A. *Appeal dismissed.*

OUDH CHIEF COURT.

SECOND CIVIL APPEAL No. 206 OF 1925.

August 24, 1926.

Present:—Mr. Justice Hasan and
Mr. Justice Raza.

CHINTA RAM AND OTHERS—DEFENDANTS—APPELLANTS

versus

RAM SAMUJH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Settlement, construction of—Widow's estate—Vested remainder—Compromise giving life-estate to widow and vested remainder to next reversioner, validity of.

A deed of settlement provided as follows: "*B* (a Hindu widow) shall so long as she lives be the *malik* in possession of her 5 pies 5 *kirants* share and after *B's* death *M*, generation after generation, in the character of the owner of the aforesaid share shall be in possession and occupation of it...*B* shall at no time have power to make a transfer of any kind:"

Held, (1) that the document did not merely create a widow's and a reversioner's interest in the property, but conferred a life-estate on *B* and a vested remainder on *M*; and that the interest acquired by *M* under the deed could be validly sold in execution of a decree against him; and [p. 501, col. 1.]

(2) that the settlement was not invalid in law. [p. 501, col. 2.]

Ramsumarn Prasad v. *Shyam Kumari* (1) and *Mata Prasad* v. *Nageshar Sahai* (2), relied on.

Appeal against a decree of the Additional District Judge, Gonda, dated the 9th January, 1925, reversing that of the Subordinate Judge, Gonda, dated the 30th November, 1921.

Mr. *M. Wasim* (for Mr. *B. N. Srivastava*), for the Appellants.

Mr. *A. P. Sen*, for the Respondents.

JUDGMENT.—This is the defendants' appeal from the decree of the Additional District Judge of Gonda, dated the 9th of January, 1925, reversing the decree of the Subordinate Judge of the same place dated the 30th of November, 1921. The Court of first instance dismissed the plaintiffs' suit but on appeal by the plaintiffs the learned Additional District Judge has decreed it.

The point for decision in second appeal before us is a short one. The facts now admitted are are follows:—

Kalidat and Mangal were two separated brothers. A 5-pies 5-*kirants* share in village Narainpur *muafi*, pura Bednagar, *pargana* and District Gonda, now in suit was owned by Kalidat. On his death in 1895 Kalidat left surviving him his widow, *Musammat* Bhagwandei and also his brother, Mangal. Kalidat had no child. Mangal died about six years and *Musammat* Bhagwandei about 2½ years before the institution of the suit, out of which this appeal arises. The suit was filed on the 13th of August, 1920.

On the death of Kalidat *Musammat* Bhagwandei, his widow, obtained an order of the entry of her name in place of her deceased husband in the revenue registers. In January, 1899, Mangal brought a suit against *Musammat* Bhagwandei claiming title to and recovery of possession of the property in suit on the basis of an oral Will made in his favour by his brother, Kalidat. The litigation ended in a settlement between Mangal and *Musammat* Bhagwandei dated the 4th of April, 1899, (Ex. A2).

It appears that one Rani Ritraj Kuar had a simple money-decree against Mangal in execution of which she put the 5-pies 5-*kirants* share now in suit to sale and it was purchased by the predecessor-in-interest of the appellants on the 20th of October, 1910. The plaintiff Badri Narain, son of Mangal, claims in the present suit the recovery of the aforesaid share from the hands of the representatives of the purchaser on the alleged title that the share became vested in him in the right of a reversioner to the estate of Kalidat on the death of his widow, *Musammat* Bhagwandei. The simple point, on which the decision of the case turns, is the nature of the interest which Mangal acquired in the property in suit by virtue of the settlement of the 4th of April, 1899.

If he acquired a *spes successionis* of a Hindu reversioner contingent on his surviving Kalidat's widow then it is clear that the plaintiff must succeed. If, on the other hand, the effect of the settlement was to confer on him an estate of fee simple *in præsenti* and the creation of such an interest was valid in law the plaintiff's claim must fail. We will now give translation of the important portions of the compromise of the 4th of April, 1899:—

"The defendant (that is, *Musammat* Bhagwandei) shall so long as she lives be the *malik* in possession of her 5-pies 5-*kirants* share and after the death of the defendant, the plaintiff (that is Mangal) generation after generation in the character of the owner of the aforesaid share shall be in possession and occupation of it. And so long as the defendant continues to live with the plaintiff she shall not be entitled

to receive the profits of the share. The plaintiff shall be in possession of the said share and shall appropriate the profits thereof and in the event of the defendant separating from the plaintiff for any cause she shall take the net profits of the aforementioned share from the plaintiff. And the defendant shall at no time have power to make a transfer of any kind."

The construction, which we place on the language of this document, is that it was not the intention of the parties to create merely a widow's and reversioner's interest in the property in suit according to the rule of the Mitakshara but that their intention was that the widow shall have particular estate, in this case a life-estate and that the remainder of the estate shall vest absolutely in Mangal and his heirs. It follows that the vested remainder which Mangal acquired under this compromise was validly sold in execution of the decree mentioned above as against him.

It now remains to consider the argument on behalf of the plaintiffs-respondents that an absolute interest in the remainder could not be created in favour of Mangal to the prejudice of the ultimate reversioner who may be alive when the reversion opened on the death of the widow. We are unable to accept this argument. In the first place, under the terms of the settlement there was no widow's estate left in *Musammat* Bhagwandei. As such she would have had power of alienation for her lifetime and of an absolute alienation is case of necessity. Of this power she was deprived by the settlement. By virtue of the settlement she obtained a particular estate of a peculiar nature, that is a life-estate with no power of alienation whatsoever. Further, the settlement disposes of the remainder of the estate after the particular estate created in favour of the widow. We find nothing in law to prevent such a settlement as the present from coming into operation. Mangal's claim was for immediate possession of Kalidat's estate on the basis of an alleged Will. If the claim had succeeded the widow would have had nothing left to her. In these circumstances we think that the settlement was reasonable and prudent. We are also of opinion that it was for the interest of the estate. The immediate estate in its entirety was represented by the widow and the impending danger to that estate was that the widow might have been entirely displaced in the event of Mangal's success in his claim. The reversionary estate in Mangal which had the character of a mere *spes successionis* was converted into an absolute estate in remainder. The case before us is fully covered by the principle of the decision of their Lordships of the Privy Council in the case of *Ramsumran Prasad* v. *Shyam Kumari* (1). Another decision of the same tribunal is to be found in *Mata Prasad* v. *Nageshar Sahai* (2), read with *Nageshar Sahai* v. *Mata Prasad* (3) in which a compromise between a widow and the presumptive reversioner creating a life-interest in the latter was upheld as a valid family settlement.

In view of our decision recorded above the appeal succeeds and it is, therefore, not necessary to decide other points raised on behalf of the appellants by their learned Counsel.

We accordingly allow this appeal, set aside the decree of the lower Appellate Court and restore the decree of the Court of first instance with costs in all the three Courts.

A. N. A. *Appeal allowed.*

(1) 69 Ind. Cas. 71; 49 I. A. 342; A. I. R. 1922 P. C. 356; 31 M. L. T. 200; 3 P. L. T. 749; 1 Pat. 741; 16 L. W. 956; 21 A. L. J. 18; 9 O. & A. L. R. 175; 27 C. W. N. 269; 37 C. L. J. 356; 44 M. L. J. 751; 25 Bom. L. R. 634 (P. C).

(2) 91 Ind. Cas. 370; 3 O. W. N. 1; 52 I. A. 398; 47 A. 883; 13 O. L. J. 19; A. I. R. 1925 P. C. 272; L. R. 6 A. (P. C.) 195; 28 O. C. 352; 24 A. L. J. 1; 43 C. L. J. 51; (1926) M. W. N. 83; 50 M. L. J. 18; 30 C. W. N. 626; 28 Bom. L. R. 1110 (P. C.).

(3) 69 Ind. Cas. 730; 9 O. L. J. 235; 25 O. C. 189; A. I. R. 1922 Oudh 236.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 44 OF 1926.

November 2, 1926.

Present:—Mr. Justice Ross and Mr. Justice Kulwant Sahay.

GHANESHWAR SINGH—JUDGMENT-DEBTOR—APPELLANT

versus

THAN MAL AND ANOTHER—DECREE-HOLDERS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 182—Execution of decree—Death of judgment-debtor—Application for execution against wrong legal repre-

sentative, whether 'in accordance with law'—'Step-in-aid' of execution.

An application for execution of a decree made against a wrong person, under the *bona fide* belief that that person was the real legal representative of the judgment-debtor, is an application in accordance with law within the meaning of Art. 182 of Sch. I to the Limitation Act. In any event, it is clearly an application to take a step-in-aid of execution of the decree and would give a fresh start to the period of limitation. [p. 502, col. 2.]

Balkishen Das v. *Bedmati Koer* (3), *Bipin Behari Mitter* v. *Bibi Zohra* (4) and *Manorath Das* v. *Ambica Kanta Bose* (5), followed.

Jnanendranath Basu v. *Nihalo Bibi* (2), dissented from.

Appeal from an order of the Subordinate Judge, Darbhanga, dated the 21st November, 1925.

Messrs. *L. K. Jha* and *K. P. Sukul*, for the Appellant.

Messrs. *N. C. Sinha* and *Hasan Jan*, for the Respondents.

JUDGMENT.

Kulwant Sahay, J.—On the 6th of March, 1918, the respondents-decree-holders obtained a decree for money against Bhaveshwar Singh. Bhaveshwar Singh died, and on the 16th of February, 1921, an application was made for execution of the decree against his widow, *Musammat* Jageshwari Bahuasin. Some properties belonging to the estate of Bhaveshwar Singh were sold and purchased by the decree-holders on the 17th of August, 1921. The sale was confirmed and possession was delivered to the decree-holders, auction-purchasers, in February 1922. The decree, however, was not satisfied by the sale, and fresh execution was taken out on the 2nd of May, 1924, against the widow and against Laliteshwar Singh, the father of the present appellant Ghaneshwar Singh. This application was dismissed and nothing was realized. The present execution was taken out on the 23rd of December, 1924, against the widow, *Musammat* Jageshwari Bahuasin, and against Babu Ghaneshwar Singh, the son of Babu Laliteshwar Singh who was dead. Objection was taken to the execution on behalf of Babu Ghaneshwar Singh to the effect that so far as he was concerned the execution was barred by limitation. The reason why Ghaneshwar Singh was brought on the record as a judgment-debtor was that under a *kulachar* prevailing amongst the junior branches of the family of the Darbhanga Raj, widows did not inherit *babuana* properties. This was held by the Privy Council in *Ekradeshwar Singh* v. *Janeshwari Bahuasin* (1).

The learned Subordinate Judge has held that the previous application against the widow would save limitation, and he has disallowed the objection of the judgment-debtor. In this appeal by the judgment-debtor it is contended that the first application for execution against the widow was not an application in accordance with law and, therefore, could not save the present execution from the bar of limitation. It is contended that the first application was made against a person who did not represent the estate of the deceased judgment-debtor, Bhaveshwar Singh, and, therefore, that was not an application in accordance with law.

It is true that the widow did not inherit the estate of Bhaveshwar Singh which was a *babuana* property; but it has been found that the widow was in possession, and the brother and nephew of Bhaveshwar Singh, who were separate from him, were not in possession. Some property was sold and possession given to the decree-holder, auction-purchaser, without any objection. The learned Subordinate Judge was of opinion that the first execution was brought against a wrong person under a *bona fide* mistake and the application was one in accordance with law, within the meaning of Art. 182 of the First Schedule to the Indian Limitation Act. On behalf of the appellant reliance is placed upon the decision in *Jnanendranath Basu* v. *Nihalo Bibi* (2). That decision, no doubt, supports the appellant's contention; but the Calcutta High Court as well as the Madras High Court have taken a different view. In *Balkishen Das* v. *Bedmati Koer* (3) it was held that an application made against a wrong person under a *bona fide* belief that that person was the legal representative of the deceased judgment-debtor was a good application, and even if it could not properly be regarded as an application under s. 234 of the old C. P. C., by reason of mistake, it would still be an application to take a step-in-aid of execution. In that case there was a reasonable doubt as to who the legal representatives of the deceased judgment-debtor

(1) 25 Ind. Cas. 417; 42 C. 582; 18 C. W. N. 1249; 27 M. L. J. 373; 16 M. L. T. 382; 1 L. W. 863; (1914) M. W. N. 807; 12 A. L. J. 1217; 21 C. L. J. 9; 17 Bom. L. R. 18; 41 I. A. 275 (P. C.).

(2) 6 Ind. Cas. 38; 32 A. 404; 7 A. L. J. 512.

(3) 20 C. 388; 10 Ind. Dec. (N. S.) 263.

were, and the Court held that the previous application was filed under a *bona fide* mistake and saved the subsequent application from limitation. This view was accepted in *Bipin Behari Mitter* v *Bibi Zohra* (4). In *Manorath Das* v. *Ambica Kanta Bose* (5), Mookerjee, J., relied upon *Balkishen's case* (3) and the case of *Bipin Behari Mitter* v. *Bibi Zohra* (4), quoted above, and approved of the principles laid down in these decisions. I am inclined to agree with the view taken by the learned Subordinate Judge and to hold that the first application against the widow was a good application in accordance with law and, in any event, it was clearly an application to take some step-in-aid of execution of the decree and gave a fresh start to the period of limitation.

The appeal must be dismissed with costs.

Ross, J.—I agree.

A. N. A. *Appeal dismissed.*

(4) 35 C. 1047.

(5) 1 Ind. Cas. 57; 9 C. L. J. 443; 13 C. W. N. 533.

MADRAS HIGH COURT.

CIVIL APPEALS NOS. 422, 432 AND 433 OF 1922 AND APPEAL SUIT NO. 394 OF 1923.

August 13, 1926.

Present:—Sir Kumaraswami Sastri, KT., Officiating Chief Justice, and Mr. Justice Curgenven.

BOBBALADI GATEPPA, MINOR, BY NEXT FRIEND ANDRAGAL ADEPPA—PLAINTIFF—APPELLANT

versus

BOBBALADI ERAMMA AND OTHERS—DEFENDANTS—RESPONDENTS.

Jains—Hindu Law, whether applicable to Jains—Presumption—Jain widow, adoption by, without consent of husband or sapindas, *legality of.*

Jains are governed by Hindu Law in the absence of proof of any custom to the contrary. [p. 504, cols. 1 & 2.]

An adoption by a Jain widow without the authority of the husband or the consent of the *sapindas* is invalid in the absence of proof of any custom or local usage to the contrary. [p. 505, col. 1.]

Peria Ammani v. *Krishnasami* (10), followed.

[Case-law considered.]

Appeals against the decree of the Court of the Subordinate Judge, Bellary, dated the 1st September, 1922, in O. S. Nos. 56 and 59 of 1921 and 130 of 1920, and 34 of 1921.

Mr. *C. Sambasiva Rao*, for the Appellant.

Mr. *P. Venkatramana Rao*, for the Respondents.

JUDGMENT.

Kumaraswami Sastri, Offg. C. J.—The only question in these appeals is whether the consent of the husband or his *sapindas* is necessary to validate an adoption made by a Jain widow. The lower Court held that the Jains are governed by Hindu Law in the absence of proof of any custom to the contrary and that the adoption is invalid as no consent was obtained either from the husband or his *sapindas*. The finding of fact as to the absence of consent is not disputed before us. The main argument of Mr. Sambasiva Rao who appears for the appellants is that so far as the Jains are concerned, no consent is necessary and that the lower Court is wrong in thinking that the Hindu Law applied to them. Were the matter *res integra* I would be inclined to hold that modern research has shown that Jains are not Hindu dissenters but that Jainism has an origin and history long anterior to the Smritis and commentaries which are recognised authorities on Hindu Law and Usage. In fact, Maha Veera, the last of the Jain Theerthankars, was a contemporary of Buddha and died about 527 B. C. The Jain religion refers to a number of previous Theerthankars and there can be little doubt that Jainism as a distinct religion was flourishing several centuries before Christ. In fact Jainism rejects the authority of the Vedas which form the bedrock of Hinduism and denies the efficacy of the various ceremonies which Hindus consider essential. There is a great force in the observations of Holloway, J., in *Rithcurn Lallah* v. *Soojun Mull Lallah* (1) that Hindu Law cannot be applied to them. So far as Jain Law is concerned it has its own law books of which Bhadrabaku Samhit is an important one. Vardhamana Niti and Ashana Niti by the great Jain teacher Hemachandra deal also with Jain Law. No doubt, by long association with Hindus who form the bulk of the population Jainism has assimilated several of the customs and ceremonial practice of the Hindus but this is no ground for applying Hindu Law as developed by Vignaneswara and other commentators, several centuries after Jainism was a distinct and separate religion with its own religious ceremonial and legal systems, *en bloc* to Jains and

(1) 9 Mad. Jur. 21.

throwing on them the onus of showing that they are not bound by the law as laid down by the Jain law-givers. It seems to me that in considering questions of Jain Law relating to adoption, succession and partition we have to see what the law as expounded by Jain law-givers is and to throw the onus on those who assert that in any particular matter the Jains have adopted Hindu Law and custom and have not followed the law as laid down by their own law-givers. I have not been referred to any Jain law-giver requiring consent of the husband or *sapindas* to enable a widow to adopt. Several Jain communities have successfully shown the custom of adoption without consent being valid. The absence of any necessity for consent was probably due to no consent having been required by the Jain law-givers. I see nothing in the Bhadrbahu Samhita requiring any consent (see translation of Bhadrabahu Samhita by L. J. Haini, M. A. Judge, High Court, Indore). As regards Bhadrabahu Samhita, verse 40 empowers a sonless man or woman to take a boy in adoption. Verse 83 empowers a widow to adopt a boy and make over her property to him. Verse 83 runs as follows:—

"The virtuous lady may like her husband take to herself a son of a good *gotra* and instal him on the estate of her husband."

In *Maharaja Govinda Nath Roy* v. *Gulab Chand* (2) decided as early as 1833 the Pandits consulted were of opinion that according to Jain Sastras, a widow had power to adopt without any authority from her husband. There was some difference of opinion if she could depose an adopted son. They refer to Jain Sastras and there is no suggestion that the law applicable to them is the Hindu Law or that any special custom was necessary to be alleged and proved to support an adoption by a widow without consent of her husband or *sapindas*. There is a great force in the argument of Mr. Sambasiva Rao that it is for those who contend that the consent of the husband or his *sapindas* is necessary to prove that the Jains have in the matter of adoption followed Hindu Law. The matter, however, in my opinion is concluded by authority and a series of decisions extending over several years have held that the presumption is that the Jains are governed by ordinary Hindu Law unless it is shown that by custom a different law prevails among them.

In *Chotay Lall* v. *Chunnoo Lall* (3) decided in 1878 their Lordships of the Privy Council held that the ordinary Hindu Law of Inheritance should apply to Jains in the absence of any proof of special custom varying it. Their Lordships in dealing with the argument of Mr. Cowell that Jains should be presumed to be governed by their customs differing from ordinary law, and referring to the case of *Sheo Singh Rai* v. *Dakho* (4) observed that the case of *Sheo Singh Rai* v. *Dakho* (4) did no more than adopt and affirm the law to be deduced from a roll of cases in India, that when the customs of the Jains are set up they must be proved like other customs varying the ordinary law, and that, when so proved, effect should be given to them. In *Sheokuarbai* v. *Jeoraj* (5) their Lordships of the Privy Council observe:—

"The Jains are Hindu dissenters, and although, as was pointed out by Mr. Mayne in para. 46 of his Hindu Law and Usage, 'generally adhering to the ordinary Hindu Law,' that is, the law of the three superior castes, they recognise no divine authority in the Vedas and do not practise the *shradh*, or ceremony for the dead.'"

The due performance of the *shradh*, or religious ceremonies for the dead, is at the base of the religious theory of adoption, but the Jains have so generally adopted the Hindu Law that the Hindu rules of adoption are applied to them in the absence of some contrary usage (Mayne's Hindu Law, paras. 148 and 106, and cases there cited). In *Mandit Koer* v. *Phool Chand Lal* (6) it was held that unless a custom to the contrary is proved, Jains are governed by the Hindu Law of Inheritance and ordinarily the Mitakshara school of law would be applicable to them. In *Bachebi* v. *Makhan Lal* (7) it was held that the ordinary Hindu Law of Inheritance would apply to Jains in the absence of proof of custom or usage varying that law. The

(2) 5 S. D. A. 276.

(3) 4 C. 744; 3 C. L. R. 465; 6 I. A. 15; 3 Sar. P. C. J. 880; 3 Suth. P. C. J. 572; 3 Ind. Jur. 175; 2 Ind. Dec. (N. S.) 473 (P. C.).

(4) 1 A. 688; 2 C. L. R. 193; 5 I. A. 87; 3 Sar. P. C. J. 807; 3 Suth. P. C. J. 529; 2 Ind. Jur. 396; 1 Ind. Dec. (N. S.) 481 (P. C.).

(5) 61 Ind. Cas. 481; 25 C. W. N. 273; (1920) M. W. N. 627; 16 N. L. R. 170; 2 U. P. L. R. (P. C.) 161 (P. C.).

(6) 2 C. W. N. 154.

(7) 3 A. 55; 2 Ind. Dec. (N. S.) 26.

learned Judges treated the question as well settled and referred to the decision of their Lordships of the Privy Council in *Chotay Lall* v. *Chunnoo Lall* (3). The same view was taken as early as 1867 by Sir Barnes Peacock, C. J., and Jackson, J., in *Lalla Mohabeer Pershad* v. *Kundun Koowar* (8) where the learned Judges held that the Jains are governed by the Hindu Law of Inheritance applicable in that part of the country in which the property is situate. In *Asharfi Kunwar* v. *Rup Chand* (9) the learned Judges take it that the law as laid down by their Lordships of the Privy Council is that in Jain cases it rests on the party alleging a custom or practice at variance with that of orthodox Hindus to prove his allegation and they throw the onus on him of showing the custom that a widow can adopt without the permission of her husband, though on the evidence they held that custom proved. In *Peria Ammani* v. *Krishnasami* (10) it was held by Muthuswami Aiyar and Best, JJ., that the onus lay on the party asserting to show that among the Jains a widow could adopt without permission from her husband or his *sapindas*, and that the custom which was set up was not proved.

Reference has been made to authorities in Bombay but they do not afford much assistance as according to Mayukha no permission of the husband or his *sapindas* is necessary for a widow to adopt. I may, however, point out that in *Bhagvandas Tejmal* v. *Rajmal* (11) it was held that adoption amongst Jains was regulated by the ordinary Hindu Law as was their succession to their property generally and that it was for the Jains to allege and prove any custom, which was different from the normal Hindu Law and usage in the country in which the property is located and the parties reside.

Cases have been referred to where among special sects of Jains, Courts have held that a custom has been proved whereby authority to adopt is unnecessary. [See *Lakhmi Chand* v. *Gatto Bai* (12), *Manohar Lal* v. *Banarsi Das* (13), *Asharfi Kunwar* v. *Rup Chand* (9) and *Harnabh Pershad* v. *Mandil Dass* (14).

The argument of Mr. Sambasiva Rao is that there is such a general agreement as to usage not requiring consent in other parts of India that we may presume that there is such a usage among the Jains in the Madras Presidency. I do not think that having regard to the various sects in which the Jains are divided, there can be any general presumption as contended for by Mr. Sambasiva Rao. In fact so far as the Jains in the Madras Presidency are concerned the usage was negatived in *Peria Ammani* v. *Krishnasami* (10). In the present case there is no evidence of any custom among the Jains in the Bellary District and little help is afforded by the fact that this family migrated from the Nizam's dominions as there is nothing to show that in the Nizam's dominions the customary law among the Jains is that permission is not necessary.

The appeals fail and are dismissed with costs.

Curgenven, J.—The question in all these four appeals is whether the widow of a Jain is competent to make an adoption without having received her husband's consent or the consent of the *sapindas*. Padmanna, a Jain resident of the Bellary District, adopted Somanna. The father and the adopted son traded in partnership and acquired property. Padmanna made a Will leaving some of his property to his wife Viramma for her life and the remainder to Somanna. Somanna predeceased Viramma leaving a widow Maremma; and the two widows engaged in a dispute about the property. Maremma relinquished her rights for a certain consideration, but subsequently purported to adopt one Gateppa, admittedly without any authority from her husband and without the *sapindas*' consent. Appeal Suit No. 422 of 1922 arises out of a suit by Gateppa against Eramma, Maremma and others to establish the validity of his adoption. Appeals Nos. 432 and 433 of 1922 and 394 of 1923 relate to suits by Eramma to recover certain moneys, the adoption being put forward in response to her claims.

We know nothing of Padmanna's antecedents except from the statement of one witness, that he migrated to Bellary from the Nizam's dominions. But, even if this

(8) 8 W. R. 116.
(9) 30 A. 197; A. W. N. (1908) 79; 5 A. L. J. 200.
(10) 16 M. 182; 3 M. L. J. 109; 5 Ind. Dec. (N. S.) 834.
(11) 10 B. H. C. R. 241.
(12) 8 A. 319; A. W. N. (1886) 118; 5 Ind. Dec. (N. S.) 28.
(13) 29 A. 495; A. W. N. (1907) 121; 4 A. L. J. 407.
(14) 27 C. 379; 14 Ind. Dec. (N. S.) 251.

statement be accepted, it affords no help in deciding the question in issue, since no evidence has been offered as to the usage of Jains in those dominions. Indeed, no evidence of usage has been given at all, so that it lies upon the party asserting the validity of the adoption to establish that it is a part of the Jain Law that an adoption might be so made. It must be shown that there is a usage so universal as to have the force of law.

The only reported case of this Court *Peria Ammani* v. *Krishnasami* (10) related to Jain converts in Tanjore and the circumstances were perhaps special. The plaintiff was put to the proof of the custom and it was held on the evidence that he had failed to prove it. Best, J., in whose judgment Muthuswami Aiyar, J., concurred, pointed out that the Jains are seceders from Brahminical Hinduism but that they retained many of the customs of the orthodox Hindus, so that where a custom different from the ordinary Hindu Law is set up as prevailing among Jains, the burden of proving such a custom is on those who allege it, and in the absence of such proof the ordinary law must prevail. The course taken by decisions in Allahabad is in full agreement with this decision. The earliest of those cases relates to a sect of Jains known as Saraogi Agarwalas and came before the Privy Council in *Sheo Singh Rai* v. *Dakho* (4). Their Lordships' judgment shows that the position adopted by the High Court and approved by themselves was that "when amongst Hindus (and Jains are Hindu dissenters) some custom different from the normal Hindu Law of the country in which the property is located and the parties resident is alleged to exist, the burden of proving the antiquity and invariability of the custom is placed on the party averring its existence."

The evidence of the representative Jains was, therefore, taken, and upon this evidence it was found that the widow of a Saraogi Agarwala Jain enjoys the right of adoption without the permission of her husband or the consent of his heirs. In the next case, *Lakhmi Chand* v. *Gatto Bai* (12) it appears to have been accepted without contest that a Saraogi Jain widow may so adopt. The chief question arising in *Manohar Lal* v. *Banarsi Das* (13) was whether a Jain widow might adopt a married man to her husband. The judgment of Stanley, C. J., and Burkitt, J., contains an instructive summary from the works of various writers on the Jain religion. The conclusion was again drawn that the Jains are Hindu dissenters, and are governed by the Hindu Law of Adoption except in such respects as any different usage that may be proved. Hence, upon the question raised in that case it was necessary to take evidence of the usage alleged by proving a number of instances in which such adoption had been made, and these instances were held to establish the usage. The same question came before the same two Judges in *Asharfi Kunwar* v. *Rupchand* (9) and was disposed of in the same way. They quoted the ruling of the Privy Council that in Jain cases it rests on the party alleging a custom of practice at variance with that of orthodox Hindus to prove his allegation. In disposing of the appeal against that judgment the Judicial Committee took occasion again to give expression to this principle adding—

"The question in the present case was and is whether a custom applicable to the parties concerned authorising the adoption of a married boy has been established. This is, strictly speaking, a pure question of fact determinable on the evidence given in the case."

These observations apply equally to a contention that a widow may adopt without authorisation. The same principle was accepted by their Lordships of the Privy Council in *Chotay Lall* v. *Chunnoo Lall* (3) where referring to *Sheo Singh Rai* v. *Dakho* (4) they observe:

"The effect of that case is that the customs of the Jains, where they are relied upon, must be proved by evidence, as other special customs and usages varying the general law should be proved, and that in the absence of proof the ordinary law must prevail."

This principle was also found in an early Allahabad case, *Bachebi* v. *Makhan Lal* (7).

It is thus clear that the onus of establishing that Jain widows have power to adopt in the manner claimed lies upon the party asserting it. The nature and the amount of evidence sufficient to shift the onus must vary with the particular circumstances of the case. It may, however, be safely said that judicial decisions which have reference to parts of India other than the Madras Presidency are not by them-

selves sufficient material upon which to found an affirmative decision. That could only be so if the usage were so invariable as to have become a part of the Jain Law. No doubt, as was held in *Harnabh Pershad* v. *Mandil Dass* (14), judicial decisions recognising the existence of a disputed custom among the Jains of one place are very relevant as evidence of the existence of the same custom among the Jains of another place, but as that case equally shows, the evidence that the usage has application to the particular case cannot be dispensed with. It is certainly not yet possible to accept the view that this custom has so often been found to exist that the onus is now shifted on to the person who denies it. The Madras Presidency, where the single reported ruling is against such a custom, cannot be the first place in which such a doctrine should be accepted. In the absence of any evidence of local usage, therefore, it must be concluded that the adoption was not validly performed.

V. N. V. *Appeals dismissed.*

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 612 OF 1924.

July 29, 1926.

Present:—Mr. Justice Adami and Mr. Justice Macpherson.

THE PROVIDENT FUND COMMITTEE OF THE EAST INDIAN RAILWAY COMPANY—DEFENDANT—APPELLANT

versus

R. F. JOHNSON—PLAINTIFF—RESPONDENT.

Provident Fund—Arbitration clause, effect of—Rules of the Provident Fund, East Indian Railway Company, r. 26, construction of—Retirement from service, effect of, on membership—Suit for interest by servant after retirement, maintainability of—Practice—Document deliberately withheld, whether can be refered to.

The servant of a Railway Company who had retired from service sued the Provident Fund Committee of the Company for interest on the amount which stood at his credit. One of the rules of the institution provided that:—"If any dispute shall arise between the Committee or Manager and the Trustees of the Institution for the time being or between the Manager and any individual member or any executor.....then, and in every such case the matter in dispute shall be referred in writing to A and an award, order or decision of the said referee shall be a condition precedent to the right of action of any party in difference in respect of any of the matters by these rules provided for, in any way arising thereout or connected therewith.....":

Held, (1) that the failure of the defendant to apply to the trial Court to stay proceedings in view of the arbitration clause did not disentitle him to object to the validity of a decree passed without any reference being made inasmuch as under the rule the reference and an award, order or decision thereon was a condition precedent to the right of action; [p. 509, col. 2.]

(2) that the rule did not apply to disputes between the Committee and a member, though the Committee had to be sued through the Manager; [p 510, col. 1.]

(3) that the plaintiff, who had retired from service was not a 'member' of the institution within the meaning of the rule; [*ibid.*]

(4) that assuming that the plaintiff was a member and that the dispute arose between such member and the Manager, they were not 'in difference in respect of any matter provided for by the rules, in any way arising thereout or connected therewith;' [p. 510, col. 1.]

(5) that the rules contemplated a complete severance of relations on the retirement of a member and that the plaintiff thereafter became an outsider whose relations with the institution in respect to a claim to interest were governed by the Interest Act. [*ibid.*]

A party cannot be allowed to refer during argument to a document not on the record and deliberately withheld from inspection and from the proof with unfair motives. [p. 509, col. 1.]

Appeal against a decision of the Additional District Judge, Patna, dated the 11th February, 1924, modifying that of the Munsif, Patna, dated the 15th January, 1923.

Messrs. *N. C. Sinha* and *B. B. Ghosh*, for the Appellant.

Mr. *Manohar Lal*, for the Respondent.

JUDGMENT.

Macpherson, J.—This second appeal arises out of a suit by a retired head ticket collector of the East Indian Railway Company in which he claimed interest on the amount at his credit in the Provident Institution or as it is usually termed the Provident Fund—of which the servants of the Company are compulsorily members, on the allegation that there was abnormal and unreasonable delay on the part of the Committee of the Institution in making payment to him of the said amount. He sued the Committee and also the East Indian Railway Company, but the suit was dismissed against the latter by the trial Court and it is not a party to this appeal.

The case of the plaintiff was that he retired on the 28th February, 1921, and that the defendants, though bound to pay him on that date the sum of money standing at his credit including interest up to that date, failed, inexcusably and in spite of every effort on plaintiff's part, to pay anything until December, 1921, and then paid interest

only up till the end of September, 1920. He accordingly claimed interest from the 30th September, 1920, till the 30th November, 1921.

The defence of appellant was, first, that the suit was barred under the rules of the Institution; secondly, that plaintiff was only entitled to receive the sum at his credit on 30th September, 1920; thirdly, that there was no delay on the part of the Committee; and fourthly, that there was no rule under which the plaintiff could get any part of the interest claimed.

The learned Munsif held in favour of the defendant in respect of the period between 30th September, 1920, and the date of retirement but decreed the claim in respect of the period from 1st March to 30th November allowing the plaintiff interest at 3 per cent. per annum.

There was an appeal to the District Judge on behalf of the Committee and a cross-appeal by the plaintiff. The District Judge dismissed the appeal and allowed the cross-appeal to the extent of increasing the interest to 5 per cent. per annum.

So far as the allegations of plaintiff are concerned they were abundantly substantiated and in second appeal Mr. N. C. Sinha presses only the point that the suit is not maintainable in view of r. 26 of the Rules of the Provident Institution. That rule runs as follows:—

"If any dispute shall arise between the Committee or the Manager and the Trustees of the Institution for the time being, or between the Manager and any individual member, or any executor, administrator, next-of-kin, or creditor, or assignee of a member, who may become bankrupt or insolvent, or any person claiming to be such executor, administrator, or next-of-kin, creditor, or assignee, or to be entitled to any moneys deposited in the Institution, then and in every such case, the matter in dispute shall be referred in writing to the Advocate-General or Standing Counsel in Calcutta; and an award, order, or decision of the said referee shall be a condition precedent to any right of action of any party in difference in respect of any of the matters by these rules provided for, in any way arising thereout or connected therewith; and whatever award, order, or determination shall be made by the said referee, shall be binding and conclusive on all parties, and shall be final to all intents and purposes without an appeal."

On behalf of the respondent Mr. Manohar Lal contends that the plea should not be considered inasmuch as there is not and there has never been on the record a copy of the rules of the Provident Institution. Strange as it may seem, the fact is as stated. The plaintiff's Pleader endeavoured to purchase a copy from the East Indian Railway Company Press at which it was printed, but was informed that the rules were not issued to the public. As the rules were referred to in the written statement of appellant an application for inspection was made to the Court which eventually directed the defendant to produce a copy by the 14th December. The order was not complied with and time was allowed till 4th January but no copy was produced then or until the case went to trial on the 8th January. The Vakil for defendant having referred to the rules at the time of argument, a petition objecting to any such use of them and to their being treated as a part of the defence was filed on behalf of the plaintiff on which the order of the Court was that the objection "would be considered at the time of writing out judgment." The rules had not been proved in any way nor even placed on the record nor apparently shown to the Counsel of the plaintiff but according to the judgment a copy was handed over by the Vakil for the defendant to the Munsif who used it in writing his judgment but made no reference to the plaintiff's objection to it. There being no copy on the record, the plaintiff's Counsel was unable either to inspect it or to get a copy even on payment of copying fees. A similar objection was taken before the Appellate Court which declined to accede to it on the ground that the rules were freely referred to in the lower Court without any objection and that, therefore, the objection before him was too late. It is obvious from what has been set out above that here the Appellate Court was under a misapprehension, there having been very strenuous oral and written objection to reference to the rules which had not been produced for inspection nor filed in Court and of which the plaintiff knew nothing. In this Court also, not only had Counsel for the respondent not been supplied with a copy of the rules in accordance with the practice that no paper can be referred to at the hearing unless a copy has been previously supplied to the Advocate for the opposite party, but no copy was provided

on the first day of the hearing either for him or for the Judges. In fact a typed copy of some of the rules was only handed over to Mr. Manohar Lal after the learned Advocate for the appellant had spoken for some time on the second day, a similar copy being supplied to the Second Judge. Mr. Naresh Chandra Sinha has no answer to this argument except the somewhat cynical one that the rules are before the Court now.

To my mind the contention on behalf of the respondent is entirely reasonable. No doubt, the trial Court did not strike out the defence of the appellant under the provisions of O. XI, r. 21 as it might well have done. But the defendant Committee have persisted in their tyrannous behaviour towards the plaintiff. The plaintiff has been greatly prejudiced in the conduct of his case inasmuch as his legal advisers (in point of fact he himself also) were kept in ignorance of the rules in an oppressive manner contrary to accepted ideas of fair dealing as between the Committee of a Provident Institution and an individual who has been a member of that institution and as between litigant and litigant. The defendant Committee relied upon the rules as a defence, but failed to prove them or place them on the record or even to give the plaintiff a correct idea of what they are. Appellant is entitled to no sympathy. On the contrary, as will be obvious from a later part of this judgment, appellant acted with deliberate design. In order to make some sort of defence the Committee had in the written statement misquoted in their own favour the rule upon which reliance was placed as a bar to the suit, and so were concerned to conceal the misdeed by preventing the plaintiff's Counsel from seeing a copy of the rules and bringing the truth to the knowledge of the Court. In my opinion they cannot be allowed to refer to a document not on the record and deliberately withheld both from inspection and from the proof, with a most unworthy object. Such being the case, the present appeal must fail as they have no answer to the portion of the plaintiff's claim which is now in controversy. Had it been necessary to negative this plea of respondent and eventually to decree the appeal, it would, in my judgment, have been equitable to make the appellant Committee pay out out of their own costs throughout, but also those of plaintiff in this Court and as allowed by the lower Appellate Court.

A few words may, however, be said as to the appellant's plea.

It is contended on behalf of the appellant that the plaintiff had no right of action inasmuch as there was no award, order or decision of the Advocate-General or Standing Counsel in his favour after reference in writing of the matter in dispute to one of them. Reliance is placed on *Scott* v. *Avery* (1) and the decisions which follow it in particular that of the Judicial Committee in *Hallen* v. *Sapaeth* (2). For the plaintiff Mr. Manohar Lal contends in the first place that the decisions applicable are *Dawson* v. *Fitzgerald* (3), *Doleman & Sons* v. *Ossett Corporation* (4) and *Ram Prosad Surajmull* v. *Mohan Lal Lachminarain* (5), there being first a promise to pay in r. 16, whereby on the retirement of a member of the Institution from the service of the Company the Committee shall pay him the sum of money standing at his credit on the 30th March or 30th September preceding his retirement, and then an independent agreement in r. 26 for reference to arbitration. That view was apparently taken by the learned District Judge who held, probably in reliance on *Ram Prosad Surajmull* v. *Mohan Lal Lachminarain* (5), that the proper course for defendant was to apply to the trial Court to stay proceedings in view of the arbitration clause, and that, as defendant failed to do that, he cannot at a later stage object to the decree made by the Court. In my opinion the construction put upon r. 26 by the appellant is correct. The decision in *Scott* v. *Avery* (1) is applicable. Rule 26 establishes a condition precedent to a right of action in a case to which it applies and is not merely an independent collateral agreement to refer to arbitration.

Mr. Manohar Lal next contends that r. 26 is not applicable to plaintiff's suit. The contention is well-founded.

In the first place, the rule has no reference to a dispute between the Committee

(1) (1856) 5 H. L. C. 811; 25 L. J. Ex. 303; 2 Jur. (N. S.) 815; 4 W. R. 746; 10 E. R. 1121; 101 R. R. 892.

(2) (1923) A. C. 684; 92 L. J. P. C. 181; 129 L. T. 803.

(3) (1876) 1 Ex. D. 257; 45 L. J. Ex. 893; 35 L. T. 220; 24 W. R. 773.

(4) (1912) 3 K. B. 257; 81 L. J. K. B. 1092; 107 L. T. 581; 76 J. P. 457; 10 L. G. R. 915.

(5) 60 Ind. Cas. 895; 38 C. L. J. 67; 47 C. 752.

and a member. No doubt the Committee is sued through the Manager of the Institution, but the rules make a distinction between them and, in particular, there is no evidence as to what business of the Company the Committee with the consent of the Board of Directors of the East Indian Railway Company have made over to the Manager. That the defendant Committee was conscious of this weakness in their position is manifest from the fact that in their written statement they misquoted r. 26, setting out—"It is provided that any dispute or difference arising between the Committee or Manager and any individual member shall be referred in writing to the Advocate-General or Standing Counsel in Calcutta:" whereas in fact r. 26 makes no provision for a dispute between the Committee and an individual member.

Furthermore, it would hardly appear that the plaintiff at the date of suit was a member of the Provident Institution within the meaning of r. 26, since for the purposes of r. 16 already quoted "service" of the Company, from which he had retired, is synonymous with membership of that institution.

Finally, assuming that plaintiff was a member within the meaning of r. 26, and that the dispute arose (as is not shown) between such member and the Manager, it is exceedingly doubtful whether they were "in difference in respect of any matter by these rules provided for, in any way arising thereout or connected therewith." The rules contemplate payment of the amount at credit at the date of the retirement of the member from service, and so far as a member not belonging to specified classes to which plaintiff did not belong is concerned, nothing further, or rather they contemplate a complete severance of relations thereafter, the member becoming thereafter an outsider, whose relations with the Institution are in respect of a claim to interest governed by the Interest Act.

Thus the appellant would also have failed on the ground advanced in this appeal.

This appeal is without merits and I would dismiss it with costs.

Adami, J.—I agree.

A. N. A. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 325 OF 1925.

July 28, 1926.

Present:—Mr. Hallifax, A. J. C.

BAJIRAO—APPLICANT

versus

NATIONAL STORES—NON-APPLICANT.

C. P. C. (Act V of 1908), O. VIII, r. 6—Set-off, nature of—Plea of set-off and discharge, difference between.

Where a Company sued one of its servants who had left its service, upon a pro-note executed by him and the defendant pleaded that a certain amount was due to him from the Company on account of the deposit he had made with the Company and that he had paid in cash the balance necessary for discharging the pro-note in full:

Held, that the plea of the defendant was not one of set-off but one of satisfaction and that, therefore, the defendant was not bound to pay Court-fee on the amount of security due to him.

Applica ion for revision of the order of the Small Cause Court Judge, Wardha, dated the 8th August, 1925.

FACTS.—The defendant, a servant of the plaintiff Company, who had left its service was sued for Rs. 135 on the allegation that he had executed a pro-note for Rs. 180 in favour of the Company and that he had paid only Rs. 45 towards the same. Admittedly the defendant had deposited Rs. 135 with the Company as security and the defendant pleaded that this amount was appropriated towards the pro-note and that he had paid the balance of Rs. 45. The lower Court held the defendant's plea to be one of equitable set-off and disallowed it on the ground that Court-fees had not been paid on the same.

Mr. *V. N. Herlekar*, for the Applicant.

Mr. *G. Brahmarakshas*, for the Non-Applicant.

ORDER.—It is clear from Ex. D5 that the Company had to pay the defendant Rs. 135 on the day he left its service, *i.e.*, on 25th March, 1923, and that he had to pay the Company Rs. 180 on 21st October, 1922, of which he has paid a part leaving Rs. 135 still due. There is nothing more to be said about the matter. The decree of the lower Court is set aside. In its place a decree will issue dismissing the suit and ordering the plaintiff Company to pay up the costs of both parties in both Courts. Pleader's fee in this Court will be Rs. 30.

A. N. A. *Application allowed.*

MADRAS HIGH COURT.

CIVIL APPEAL No. 430 OF 1922.

March 8, 1926.

Present:—Mr. Justice Krishnan and Mr. Justice Venkatasubba Rao.

N. T. V. THUNGA *alias* KRISHNA MENON AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

NANIKUTTY AMMA AND OTHERS—DEFENDANTS NOS. 1 TO 12—RESPONDENTS.

Malabar Law—Tarwad and tavazhi—Karar *between* tavazhis *attached to* tarwad—*Division of interest—Separate* tavazhi *properties—Right of last surviving member of* tavazhi *to alienate by Will—Right of* tarwad.

Where the *tavazhis* attached to a Malabar *tarwad* enter into a *karar* by which they agree that the *tarwad* shall have no rights over the separate properties and self-acquisitions of the *tavazhis*, the last surviving member of one such *tavazhi* is solely entitled to the *tavazhi* properties and to deal with them as he chooses. A Will executed by him in respect of such properties is, therefore, valid and binding. [p. 512, col. 1.]

The *tarwad* in such a case has no rights, inchoate or otherwise, which might revive on the extinction of the *tavazhi* inasmuch as the properties being the exclusive properties of the *tavazhi*, the *tarwad* or any members thereof can get no right to them or interdict alienations in respect thereof. [p. 512, col. 2.]

Appeal against the decree of the Court of the Subordinate Judge, South Malabar at Palghat, in O. S. No. 57 of 1919.

Messrs. *A. Krishnaswami Iyer* and *P. S. Chandrasekara Iyer*, for the Appellants.

Messrs. *T. R. Ramachandra Iyer* and *A. Sivarama Menon*, for the Respondents.

JUDGMENT.

Krishnan, J.—This appeal is against the decree of the Subordinate Judge of Palghat in a suit brought by the plaintiffs to recover possession of four items of immoveable properties mentioned in schedule A to the plaint and certain moveables mentioned in Schedule B from defendants Nos. 1 to 5. The other defendants are representatives of certain *tavazhis* which the plaintiffs allege are the branches of their main Neithalath *tarwad*.

Defendants Nos. 1 to 5 claim the properties under a Will executed by one Raman Kutti Menon the last surviving member of Odavazhiveetu *tavazhi*. It is a registered Will which includes all the suit properties and being registered its genuineness is not disputed.

The plaintiffs contend that the Will is not valid as Raman Kutti Menon was not competent to will away the suit properties as he was a member of the Neithalath *tarwad* which had a right over those properties. They contend that the plaint mentioned items are joint properties and the *tarwad* had the right, therefore, of succession to them and that such a right would override any power of disposition by Will of Raman Kutti Menon.

The Neithalath *tarwad* had four *tavazhis*, namely:—

(1) Pattinhareveit,
(2) Kishakke or Vadekkeveit,
(3) Thekkevit and
(4) Odavazhiveit.

Raman Kutti Menon was the last member of the Odavazhiveit *tavazhi* now extinct. These 4 *tavazhis* were holding separate properties for themselves. We find in 1836 a *karar* entered into between the four branches Ex. XXIII. It may be mentioned here that a *karar* A which the plaintiffs produced as the true *karar* is found by the Subordinate Judge to be a forgery. That finding has not been contested before us, so that we may ignore Ex. A and deal with Ex. XXIII as the real *karar*. It is mentioned in Ex. XXIII that each of the four branches could not contract debts or mortgage the properties allotted to it under it. It was also recognised in it that each branch had its own separate properties over which the *tarwad* had no rights. The Subordinate Judge says that Ex. XXIII amounts to a permanent allotment for maintenance, liable to be set aside by the consent of all the members. There is a provision at the end of the document as follows: "The members of all the houses referred to herein have private properties. They will not be included in the *tarwad* properties. Those properties and debts therein shall vest in the members who acquired them and in the members of the house to which they belong."

There was a considerable amount of litigation between the parties subsequent to the date of Ex. XXIII. The history of this *tarwad* is largely a history of litigation. I need not refer to all the cases as the Subordinate Judge in a very careful and lengthy judgment considered all the material documents in the case and has made our task easier. I am in full agreement with him in his various findings in the case.

As a result of the long and continuous litigation the last of which was in 1868 the four houses of Neithalath *tarwad* were held to have community of property with one another and the arrangement as to

maintenance fell through. Nevertheless it was held that the provisions, at the end of Ex. XXIII that all the four houses were to keep their private properties themselves which were not to be included in the *tarwad*, and that the main *tarwad* would have no right to those properties, remained in full force. That appears from the judgment of the High Court in Ex. LV. This arrangement as to the self-acquisitions of a member of the *tavazhi* being taken by the *tavazhi* on the death of such member was in accordance with a previous custom in the family, by which the separate properties of the members of the *tavazhi* passed to it alone on their deaths and the *tarwad* got no right. On this view of the effect of Ex. XXIII it is clear that the suit properties items Nos. 2, 3 and 4I shall deal with item No. 1 about which there is a special case set up—belonged to Odavazhiveit *tavazhi* alone and were capable of being alienated or dealt with by that *tavazhi* as its own exclusive property. Those properties, therefore, belonged to Raman Kutti Menon who as the last surviving member of that *tavazhi* was entitled to deal with them as he chose. That he could have alienated the properties *inter vivos* is hardly disputed before us. But it is suggested that Raman Kutti Menon was somehow barred from disposing them off by Will. It is difficult to see how such a contention can be supported. If the properties were alienable *inter vivos* by him as they necessarily were as the separate property of his *tavazhi* of which he was the last surviving member, there is no doubt whatsoever that under the Malabar Law he was entitled to will them away also. If the properties had been left undisposed of by Raman Kutti Menon then the *tarwad* may succeed as Attalaladakkam heir against the Crown claiming escheat. They were, however, disposed of by Raman Kutti Menon by his Will which is, in my opinion, clearly valid. On this short point alone this appeal can be disposed of.

Some authorities were cited to us which dealt with impartible estates and the rights of succession to them. *Annadana Jadaya Gounder* v. *Konammal* (1), *Lakhshmi Devi* v. *Dhatrazu Belgaum Case* (2) and *Naraganti Achammagaru* v. *Venkatachalapati* (3). None of these cases has any bearing upon the present case. They refer to impartible *zemindaris* and deal with the rights of succession of the senior branch when the junior branch to which the property had passed had become extinct. It was held in those cases that when the junior branch became extinct, the rights of the senior branch revived which was till then in an inchoate state. There is nothing whatsoever in Ex. XXIII to justify the contention that such was the case under it or that though the properties were properties of the *tavazhi* there was still some inchoate right of the *tarwad* over them which would revive on the extinction of the *tavazhi*. The *tavazhis* had separate properties of their own in which the *tarwad* had no right as those were the exclusive properties of each of the *tavazhis*. They had every right to alienate them and no member of the *tarwad* could get any right to them or interdict alienation.

Our attention has been drawn to Ex. XXIV which refers to items Nos. 2 and 3 of the plaint schedule A. Exhibit XXIV shows that they were the properties of the above-named 4th *tavazhi* at the date of Ex. XXIII, though they were acquired by Krishna Kutti Menon and Manchu Menon of the Odavazhiveit in their names. They were really purchased for the *tavazhi* and belonged to the *tavazhi* alone. The argument of the learned Vakil for the plaintiffs is that these properties were purchased by Krishna Menon and Manchu Menon out of their self-acquisitions and that under the Marumakkatayam Law the main *tarwad* would succeed to them and as such the last surviving member of the *tavazhi* had no right to will them away. In support of that contention *Govindan Nair* v. *Sankaran Nair* (4) was cited as an authority. There it was held that the separate property of a member of a *tavazhi* lapsed on his death to the *tarwad* and not to the *tavazhi*. It is urged that the right of the *tarwad* to the property in the present case was in existence but was kept in abeyance till it revived on the death of the last male member of the *tavazhi*. That contention is not correct. There is no ground for it in the evidence in this case. Items Nos. 2 and 3 were *tavazhi* properties at the date of Ex. XXIII and they were acquired by Krishna

(1) 71 Ind. Cas. 533; 17 L. W. 107; (1923) M. W. N. 15; A. I. R. 1923 Mad. 402.

(2) 20 M. 256; 24 I. A. 118; 7 Sar. P. C. J. 185; 7 Ind. Dec. (N. S.) 182 (P. C.).

(3) 4 M. 250; 1 Ind. Dec. (N. S.) 1010.

(4) 2 Ind. Cas. 183; 32 M. 351; 6 M. L. T. 106; 19 M. L. J. 350.

Menon and Manchu Menon for the Odavazhi *tavazhi*. Item H of the plaint schedule was purchased out of the savings of items Nos. 2 and 3. They were the properties of the *tavazhis* at the very commencement and not such as the *tavazhi* inherited from its deceased members.

As regards item No. 1 it was specially contended that it was the property of the *tarwad* and that it was given to Odavazhiveit for the purpose of residence and as such it should be treated as on the same footing as the two items mentioned in Ex. XXIII, Maduthanar and Nelliseri which belonged to the *tarwad*. Odavazhi *tavazhi* recognising the right of the *tarwad* subsequently gave up possession of the above-mentioned Madathanar and Nelliseri to the *tarwad* and it is contended that item No. 1 also should be given to the *tarwad* in the same manner. We have to see if such a contention is correct. Defendants Nos. 1 to 5 say that the house item No. 1 was built by their *tavazhi* on land purchased by them in the year 1828-29 under the document Ex. III and that this item never formed part of the *tarwad* property. In support of Ex. III they produce Ex. IV series *pattas* granted by the East India Co. The Subordinate Judge has accepted those documents as genuine and I find no reason to differ from him. He has referred to the evidence on the point at great length and has come to the conclusion that the item belongs to the *tavazhi* and not to the *tarwad* as alleged by the plaintiffs. I agree with him and find that item No. 1 belonged to the Odavazhiveit *tavazhi* alone and that Raman Kutti Menon as the last surviving member was entitled to dispose of it also by Will in the same manner as he did the 2nd, 3rd and 4th items of the plaint schedule A.

There is also another ground on which this appeal may be disposed of. The Subordinate Judge has found that there was community of property between Odavazhiveit and other *tavazhis* till 1868 or 1869 but after that date the *tarwad* properties held by Odavazhiveetu, namely, Madathanar and Nelliseri were surrendered to the common *karnavan*. We find in 1870 by Ex. XLVI the senior member of the Odavazhiveit *tavazhi* giving away the whole of the rest of the *tarwad* properties in his hands to the common *karnavan*. The two items mentioned in Ex. XXIII as *tarwad* properties Madathanar and Nelliseri were sued for and a decree was obtained by the *karnavan* of the *tarwad* against the Odavazhiveit *tavazhi*, but in that suit the *chamayams* or buildings, tanks, wells, etc., were omitted. To avoid all difficulty in the execution of that decree Gopala Menon handed over not only the items sued for but also the *chamayams* on those properties and he thus got rid of all the *tarwad* properties from his possession. This is shown by Ex. XLVI. The result of it was that thereafter no item of *tarwad* property remained in the hands of Gopala Menon. The suggestion that he took such action as a matter of kindness towards his own main *tarwad* is one which I cannot accept. The circumstances rather show that by Ex. XLVI Gopala Menon handed over properties for which no decree had been obtained against him by the *tarwad*, because he wanted to be free from any connection, with the *tarwad* and to separate his *tavazhi* from the *tarwad* altogether. This inference is further strengthened by what was done by the other three branches of the *tavazhi* under Ex. O. Very soon after they divided all the *tarwad* properties among themselves without leaving anything to the Oadavazhiveit *tavazhi* and the latter never attempted to make any claim for maintenance against the *tarwad*. We find also subsequently a number of instances where the three branches of the *tarwad* other than Odavazhiveit *tavazhi* acting as if they were completely separate from one another and were independent units. Documents have been referred to by the learned Vakil for the respondents to show that the three *tavazhis* treated themselves as separate and independent.

There were partition deeds executed among the three *tavazhis* separately and not merely among the three main branches but also among sub-branches so formed. We find also outright alienations made of properties allotted to each of the *tavazhis*. Such alienations could not have been made if the properties were given for the purpose of maintenance only. In fact there are statements in each of these documents which seems to me to justify the suggestion that three *tavazhis* considered themselves to have no community of property with one another. Odavazhiveit *tavazhi* received a payment of an amount of Rs. 30,000 or more in redemption of a mortgage and none of the other *tavazhis* raised any claim to it. These and other

circumstances dealt with at length by the Subordinate Judge clearly show that ever since 1870 the Odavazhiveit has been treated as if it had no community of property with the other three *tavazhis* and as if it had become a separate *tarwad* by itself. It is not denied that if this is so and that Odavazhiveit had become a separate *tarwad*, the last member of it, Raman Kutti Menon was in a position to dispose of all its properties by Will.

It is unnecessary to elaborate this point as it has been dealt with very fully by the Subordinate Judge. I accept his findings, as correct. The appeal fails on both these points and is dismissed with costs of respondents Nos. 1 to 5.

Venkatasubba Rao, J.—After carefully considering the arguments advanced in the case, I have come to the conclusion that there is no substance in this appeal. The Subordinate Judge has in an exhaustive and careful judgment clearly set forth the facts and as I agree with his conclusion, I do not think it necessary either to re-state the facts in detail or to give full reasons for my judgment.

Raman Kutti Menon executed a Will in 1915 in favour of his wife and children and died in 1919. The properties disposed of are of considerable value and the object of the suit was to get a declaration that the testator had no power to make the Will and that it was inoperative.

The original *tarwad* known as the Neithalath *tarwad* was divided into four *tavazhis* or branches. They were:—

(1) Pattinhareveit,
(2) Kishakke or Vadekkeveit,
(3) Thekkevit, and
(4) Odavazhiveit.

The deceased Raman Kutti Menon belonged to the Odavazhiveit branch.

The first question to be decided is, did the deceased have community of interest in property with the members of the other branches? I may state that Raman Kutti Menon was the last member of his own *tavazhi* and that the suit has been brought as a representative suit on behalf of the members of the three remaining branches. The very protracted and complicated litigation in which this family indulged, it is unnecessary for me to describe. The facts of this litigation have been carefully analysed by the Subordinate Judge and the conclusion at which I have arrived is this. The four branches entered into an arrangement in the year 1836 by Ex. XXIII. The question that was raised in several suits, was whether it amounted to an out and out partition or whether it was merely an arrangement for the purpose of making provision for maintenance. Whatever doubts there might have been till about the year 1870, an event of great importance occurred at that time. A decree had been obtained by the common *karnavan* of the *tarwad* against the Odavazhi branch for possession of certain items of *tarwad* properties—properties which had been assigned to that branch under Ex. XXIII. The Odavazhi branch was then represented by Gopala Menon who realised that litigation was ruinous and was prepared to take a reasonable view of the situation. The decree secured to him the properties of the *tavazhi* and directed that the properties of the main *tarwad* should be surrendered. The *karnavan* owing to his own fault was not in a position to effectively reduce into possession the properties awarded to him by the decree. Gopala Menon notwithstanding the advantage that he possessed, surrendered to the *karnavan* not only the properties which he was directed by the decree to deliver but very valuable *chamayams* which were in the nature of accessories to those properties. This transaction is evidenced by Ex. XLVI of the year 1870. Soon after this, the other three branches of the *tarwad* entered into an arrangement by which there was a re-distribution of the *tarwad* properties among them. The Odavazhi branch was left out and consequently it obtained no allotment of the *tarwad* properties. This re-distribution was effected by Ex. O of the year 1871.

The effect of these two transactions was, that Gopala Menon completely divested himself of all *tarwad* properties and was content to keep in his possession the properties of his own branch. As the Subordinate Judge points out, in taking this step, Gopala Menon was clearly influenced by the desire to get rid of all legal connection with the other three branches of the *tarwad*. These events happened in or about the year 1870. Gopala Menon by his acts clearly indicated an intention to treat himself as divided and the subsequent conduct of the other three branches shows that they agreed to the severance of interest of the Odavazhi branch. This acquiescence is proved by a long and continuous course of conduct extending over about half a century. The probabilities and the

evidence discussed by the Subordinate Judge leaves no room for doubt that the Odavazhi branch ceased to have community of interest in the property with the main *tarwad*. I agree with the finding of the learned Subordinate Judge in para. 93 of his judgment.

On this finding alone the plaintiffs' suit is liable to be dismissed. If there is no community of interest it is not suggested that Raman Kutti Menon would be under a disability regarding the making of a Will (see para. 154 of the Subordinate Judge's judgment). Though in this view it is not necessary to discuss the other questions raised, I shall briefly refer to the plaintiffs' contentions and deal with them.

Granting for a moment that there was no division can the plaintiff succeed? The principal contest has been in regard to items Nos. 2 and 3 of the schedule to the plaint. It is admitted that item No. 4 was acquired with the income of items Nos. 2 and 3 and a separate consideration of it is, therefore, not called for. Taking items Nos. 2 and 3 it is common ground that they were in existence on the date of Ex. XXIII. They were acquired in the names of Krishna Menon and Manchu Menon of the Odavazhi branch. Exhibit XXIV shows that although these properties were acquired in their names, they treated them as belonging to their branch and there can be no doubt that those two items were understood to belong to the Odavazhi branch. If thus these items belonged to that branch it is not disputed that either that branch as a body or the last surviving member of that branch could effectively dispose of the item. Raman Kutti Menon was the last surviving member and there was nothing in law to prevent him from disposing of them by Will. As I have said this position has not been disputed.

Mr. Alladi Krishnaswami Iyer, the learned Vakil for the plaintiffs, has, however, put his case thus. He says that these properties were the self-acquisitions of Krishna Menon and Manchu Menon, which statement, by the way, as I have shown, is not a correct statement of fact. He then proceeds to say that on the death of those two individuals under the ordinary Marumakkatayam Law, the main *tarwad* would succeed to these two items and not the *tavazhi* to which these two individuals belonged. However, by reason of a family custom recognised by the High Court in some previovs litigation, the *tavazhi* was allowed to succeed. This is how Mr. Krishnaswami Iyer puts it. The fact that the *tavazhi* succeeded to the properties, according to the learned Vakil, did not completely extinguish the right of the *tarwad* to the properties. The right of the *tarwad* was inchoate and on the death of the last member of the *tavazhi*, it fully revived. To sustain his argument it was necessary for the learned Vakil to urge that the main *tarwad* possessed throughout a right to interdict alienation; in other words neither could the *tavazhi* nor the last member of it alienate these items. The branch was bound to keep the properties in tact, could only enjoy the income and on the extinction of the branch, the *tarwad* would obtain a right to take possession of them. This seems to me to be an utterly untenable proposition. The analogies of the Mitakshara and the Marumakatayam Law, alike fail to show that this contention is well-founded. The learned Vakil has not been able to cite any authority to support his argument. I am clearly satisfied that the contention is wrong, but as I have pointed out, this argument proceeds upon certain hypothetical facts which do not exist in the present case. The plaintiff has not shown that the properties belonged exclusively to Krishna Menon and Manchu Menon and that they devolved upon the Odavazhi branch by reason of any family custom.

In regard to the first item I accept the finding of the lower Court and I have nothing to add to what my learned brother has said.

On every point raised the plaintiff fails. The appeal, therefore, must be dismissed with costs.

V. N. V. *Appeal dismissed.*

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 1331 OF 1926.

November 12, 1926.

Present:—Mr. Justice Jai Lal.

KANHYA LAL AND OTHERS—JUDGMENT-DEBTORS—APPELLANTS

versus

MEGH RAJ AND ANOTHER—DECREE-HOLDERS, TEK CHAND AND OTHERS—VENDEES—RESPONDENTS.

C. P. C. (Act V of 1908), O. XXI, rr. 66, 90—Notice, omission to issue—Sale, validity of.

Omission to issue notice under O. XXI, r. 66 C. P. C., is not an illegality which makes a sale void *ab initio*, but is a mere irregularity such as is contemplated by O. XXI, r. 90 and a sale will not be set aside on that score unless it is shown that the judgment-debtor has suffered substantial injury thereby.

Miscellaneous first appeal from an order of the Senior Sub-Judge, Ferozepore, dated the 8th May, 1926.

Mr. *Fakir Chand*, for the Appellants.

Mr. *Jaggan Nath Bhandari*, for the Respondents.

JUDGMENT.—Immoveable property belonging to the appellant was sold on the 7th and 8th April, 1926, in execution of a decree. Objections were filed by him on the 19th April on the ground of material irregularity in publishing and conducting the sale and also on the ground of substantial injury suffered by him. Twenty-ninth April, 1926 was the next date fixed by the Executing Court. On that date the judgment-debtor and the decree-holder both were present and the latter filed a written reply to the objections of the former. Thereupon the Court fixed the 8th May, 1926, for confirmation of the sale and the decision on the objections. The Court further ordered that the officer who conducted the sale should be summoned for the date fixed. On the 8th May the statements of the decree-holder, the judgment-debtor and one of the purchasers were recorded and then the Court passed the order under appeal by which it confirmed the sale holding that there was no material irregularity in publishing and conducting it and that the judgment-debtor had not established that he had suffered any material injury.

The main ground on which the order of the Senior Sub-Judge is attacked before me is that no opportunity was given to the appellant to substantiate his objections in spite of a request for the adjournment of the case for that purpose. I have already stated that on the 29th April the Senior Sub-Judge had expressly fixed the next date for 'decision of the objections' by the judgment-debtor and, therefore, the latter had sufficient notice that the case would be concluded on the 8th May. He had summoned no witness for that day nor is there any note by the Senior Sub-Judge that he asked for an adjournment on the 8th May though in the judgment the learned Judge has remarked that he did not think it necessary to adjourn the case "for enquiry into such a flimsy matter and, therefore, disposed of the objections without further delay against the judgment-debtor." In my opinion even if the request was made for the adjournment of the case on the 8th May the learned Judge was fully justified in refusing to accede to it.

It was then contended by the learned Counsel that non-compliance with the provisions of O. XXI, r. 66, C. P. C., is not a mere irregularity in publishing the sale but is an illegality which makes the sale void *ab initio*. No authority was cited in support of this proposition which on the face of it has no force. In my opinion omission to issue a notice under O. XXI, r. 66, is an irregularity such as is contemplated by O. XXI, r. 90. The judgment-debtor failed to show that he suffered substantial injury by the alleged material irregularities. Under the circumstances it is unnecessary to consider whether there were material irregularities in publishing the sale though on that point I am not disposed to agree with the conclusions of the Senior Sub-Judge.

Another objection raised by the judgment-debtor was that the decree had been adjusted orally by the decree-holder by accepting a smaller amount. I am unable to see how such an objection could be raised under O. XXI, r. 90. In any case there is no proof of such an adjustment and the conclusion of the learned Senior Sub-Judge is correct.

I dismiss this appeal but make no order as to costs.

R. L. *Appeal dismissed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 519 OF 1923.

September 30, 1925.

Present:—Mr. Justice Viswanatha Sastri.

VATHI VEERABHADRAYYA AND OTHERS —PLAINTIFFS—APPELLANTS

versus

TANGADU SANYASI AND OTHERS— DEFENDANTS—RESPONDENTS.

C. P. C. (Act V of 1908), s. 11—Suit to establish exclusive use of water of channel—Right to surplus water only found—Subsequent suit alleging obstruction to use of surplus water -Res judicata.

Where a plaintiff claimed in a suit exclusive use of the water that flowed along a channel but his rights were upheld only to the surplus water after defendant's lands had been irrigated, a subsequent suit by the plaintiff alleging that the flow of the

surplus water as found in the first suit was obstructed by the defendant by the putting up of another dam and by further raising the level of the channel was not barred by *res judicata*, inasmuch as the later suit was based on a fresh cause of action which arose on an obstruction caused subsequent to the first suit.

Second appeal against a decree of the District Court, Ganjam, in A. S. No. 62 of 1920, preferred against that of the Court of the District Munsif, Chicacole, in O. S. No. 678 of 1918.

Mr. *B. Jagannatha Doss*, for the Appellants.

Mr. *G. Lakshmanna*, for the Respondents.

JUDGMENT.—Appeal by plaintiffs against the decree of the Court of the District Judge of Ganjam, in Appeal Suit No. 62 of 1920.

The only question in this second appeal is whether the appeal was barred by *res judicata* by reason of the decision in Second Appeal No. 1103 of 1914. The suit out of which the appeal arises was for the removal of elevations of earth raised by the defendants in the Batte marked C in the plan and for a permanent injunction restraining the defendants from obstructing in any manner the free flow of water to the Versirikajola tank marked A in the plan, according to *mamool*, along the Batte C. Both the Courts have held that the decision in the previous litigation operated as *res judicata*.

The previous suit out of which Second Appeal No. 1103 of 1914 arose was instituted by the plaintiffs for possession of the Batte C after removing certain obstructions put up, and for a permanent injunction restraining the defendants from meddling with or causing any manner of damage as would cause any obstruction or hindrance to the free flow of water through the said Batte from the Balabanda tank to the Versirikajola tank. In that suit the District Munsif found that the Batte C to C-4 in the plan filed in that suit was a source of supply to the plaintiffs' tank of Versirikajola but he also found that the defendants were also entitled to the use of the water that flowed along the Batte for the irrigation of their eastern lands, and that the plaintiffs were entitled only to the remnant of the water; and as the suit was for a declaration of the plaintiffs' absolute rights and for an injunction restraining the defendants from taking water that flowed along the Batte, he dismissed the suit. On appeal, the Subordinate Judge passed a decree in favour of the plaintiffs. On second appeal, this Court, after calling for a fresh finding from the Subordinate Judge, reversed his decision and restored that of the District Munsif. The restoration of the decision of the District Munsif in his opinion, indicates that the finding of the District Munsif with regard to the right of plaintiffs to use the water that flowed in the Batte after defendants' lands were irrigated was upheld. This finding could not have been incorporated in the decree, because the suit had to be dismissed, once the plaintiffs' exclusive title was found against.

In the suit out of which the present second appeal arose, the plaintiffs claimed the right to water that flowed along the Batte C after the defendants had taken as much water as was required for the irrigation of their lands. It was also alleged that a dam was put up at the point marked D in the plan which completely blocked the flow of water into the plaintiffs' tank. It was also alleged that elevations were put up in the Batte C to prevent the flow of water by which the defendants' lands had been irrigated.

I fail to see how the decision in the previous suit operates as *res judicata*. The District Munsif says that, in the previous suit, the plaintiffs did not put forward their "natural rights" to the water (whatever the words "natural rights" may mean) and he states that in the present suit, they put forward their "natural rights." I am unable to understand the reasoning of the learned District Munsif. In the previous suit, the plaintiffs claimed exclusive use of the water that flowed along the Batte C but their rights were upheld only to surplus water which remained after the defendants' lands had been irrigated. In the present suit the plaintiffs say that the flow of surplus water is obstructed by the putting up of another dam D and by further raising the level of the Batte C. The fresh dam D was put up after the decision of the previous suit and has caused an obstruction which has given rise for a fresh cause of action. The learned District Judge proceeds on the same reasoning as that of the District Munsif. In my opinion, there is no bar of *res judicata*.

The appeal is, therefore, allowed and the decisions of both the Courts are reversed and the suit is remanded to the Court of first instance to be tried on all the issues excepting issue No. 9. The appellants will have

costs in this Court. The costs in both the lower Courts will abide and follow the result. The appellants will get refund of Court-fees both here and in the lower Appellate Court.

V. N. V. *Appeal allowed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 155-B OF 1926.
November 30, 1926.
Present:—Mr. Hallifax, A. J. C.
Sheikh GULAB—PLAINTIFF—APPLICANT
versus
LAYANUJI BARI—DEFENDANT—NON-APPLICANT.

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 41—"Joint," whether refers to joint Hindu family.

"Joint property" in Art. 41 of Sch. II of the Provincial Small Cause Courts Act does not refer to the property of a joint Hindu family as there is separate mention of that sort of property later in the same Article.

Revision against an order of the Small Cause Court Judge, Daryapur, dated the 10th August, 1926, in Small Cause Suit No. 301 of 1926.

Mr. *A. V. Khare*, for the Applicant.

ORDER.—The allegations in the plaint are that the plaintiff and the defendant and three other persons took a joint lease of a field for Rs. 1,000 of which the plaintiff paid the whole on the 10th of January, 1923; he accordingly instituted the present suit against the defendant for the recovery of the one-fifth share of the money he ought to have paid.

The plaint was filed on the 30th of October, 1925, in the Court of the Subordinate Judge, and returned to the plaintiff on the 15th of February, 1926, on the ground that the suit was triable by the Small Cause Court. It was presented to that Court on the 18th of February and returned again to the plaintiff on the 10th of August, the learned Judge being of opinion that the suit was excluded from the jurisdiction of that Court by Art. 41 of the Schedule of the Small Cause Courts Act.

No reason is stated by the learned Subordinate Judge for holding that the suit is triable by a Small Cause Court, and it is not improbable that he overlooked Art. 41 of the Schedule of the Act. It might possibly be suggested that the word *joint* in that Article refers to the property of a joint Hindu family, and in fact some such suggestion was made in this Court. But that is shown to be incorrect by the separate mention of that sort of property later in the same Article.

The order of the Court of the Subordinate Judge passed on the 15th of February, 1926, under which the plaint was returned to the plaintiff is set aside. The plaint, which has been filed here, will be sent to that Court and accepted by it as filed on the 30th of October, 1925. No order in respect of the costs of these proceedings is required.

G. R. D. *Order set aside.*

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 1755 OF 1926.
November 11, 1926.
Present:—Mr. Justice Martineau.
SAJAWAL—SURETY—APPELLANT
versus
FIRM GOBIND RAM-SHANKAR DAS THROUGH LADHA RAM AND RAM LAL PARTNERS AND SHOP JETHA RAM-ATAR CHAND—DECREE HOLDERS AND GHULAM SARWAR KHAN—JUDGMENT-DEBTOR—RESPONDENTS.

C. P. C. (Act V of 1908), s. 145, proviso—Execution of decree against surety—Simultaneous issue of notice and warrant of arrest, legality of.

Proviso to s. 145, C. P. C., merely requires a notice to be given to the surety before the decree is executed against him but does not debar an issue of warrant of arrest simultaneously with the issue of notice inasmuch as the decree is executed against him not by his arrest but by his detention in prison.

Miscellaneous first appeal from an order of the Senior Sub-Judge, Multan, dated the 25th June, 1926.

Bakhshi *Sain Das*, for the Appellant.

Mr. *Ram Chand Manchanda*, for the Respondents.

JUDGMENT.—The appellant, Sajawal, stood surety for Ghulam Sarwar Khan against whom the respondents had a decree, and as Ghulam Sarwar Khan has not paid the decretal amount the decree-holder has

proceeded against Sajawal, and the Senior Sub-Judge has ordered that the latter be detained in the civil prison for a period of 6 months.

It is urged for the appellant that no notice was given to him and that the order is, therefore, illegal. The order of the 4th May, however, shows clearly that notice was given to the appellant to show cause why his bond should not be forfeited. That was a sufficient compliance with proviso to s. 145, C. P. C. Objection is taken to the procedure of the lower Court in issuing a warrant of arrest against the appellant at the same time that it issued the notice. But s. 145 merely requires a notice to be given to the surety before the decree is executed against him and this was done. The decree was executed against him not by his arrest, but by his detention in prison (see O. XXI, r. 30, C. P. C.,) and the order for his imprisonment was passed after the notice had been given to him and he had been given an opportunity of showing cause why the decree should not be executed against him.

There is no force in any of the grounds of appeal and the appeal is in fact purposeless seeing that the appellant has undergone nearly the whole of the term of imprisonment imposed by the lower Court.

I dismiss the appeal with costs.

R. L. *Appeal dismissed.*

RANGOON HIGH COURT.
FULL BENCH.

CIVIL REFERENCE No. 9 OF 1926 IN SECOND CIVIL APPEAL No. 161 OF 1926.

August 2, 1926.

Present:—Sir Guy Rutledge, KT., Chief Justice, Justice Sir Benjamin Herbert Heald, KT., Mr. Justice Carr and Mr. Justice Duckworth.

MAUNG OK KYI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MA PU AND OTHERS—DEFENDANTS—RE-PONDENTS.

Mortgage—Simple mortgage—Subsequent invalid sale and delivery of possession to mortgagee—Suit for redemption—Sale and possession, whether good defence—Part performance, doctrine of.

When there is a registered simple mortgage of land and a subsequent transfer of possession of the land to the mortgagees without a document by the mortgagors and the latter assert that this was under the original mortgage while the former plead that it was a fresh transaction amounting to an outright but invalid, sale to them, the mortgagees can in a suit by the mortgagors for redemption of the mortgage plead and prove this invalid sale in equity and if they prove the same it is a complete answer to the mortgagors' suit for redemption. [p. 522, col. 2; p. 523, col 1]

Maung Myat Tun Aung v. *Maung Lu Pu* (2), overruled.

Ma Pyone v. *Ma U* (1), approved.

ORDER OF REFERENCE.

Duckworth, J.—"For the purposes of this Reference, it suffices to state that the proceedings commenced by a registered simple mortgage made by the plaintiffs-appellants to the respondents for Rs. 540 in April, 1910.

"Subsequently, and about one year later, the property was delivered to the respondents' entire posssession.

"The appellants contend that the respondents were merely given the usufruct, because they themselves could not pay up the interest due on the mortgage.

"The respondents set up the plea that the land was sold outright to them, the reason being that interest for one year could not be paid, and because the appellants had defaulted in one year's rent due to them.

"Whatever the second transaction was, it was evidenced by no document, and, of course, there was no registration. This is common ground.

"The original registered simple mortgage was not disputed.

"Both the lower Courts agreed in dismissing the plaintiffs-appellants' suit, but they proceeded on the ground that the usufructuary mortgage set up by the appellants could not be proved, inasmuch as it was not in writing, and registered. This was, of course, wrong.

"This land has stood since the transfer of possession, in the defendants-respondents' name.

"There are two divergent rulings of this Court as to whether, in the circumstances, stated, the respondents-defendants could equitably set up the invalid sale as an agreement to sell, by way of a shield, so as as to deprive the appellants of the right of redemption of the registered simple mortgage.

"The present case is, however, slightly different, inasmuch as there was no subsequent cash payment when the invalid sale transfer took place, but there was apparently fresh consideration because interest due

and possibly rent for the land due by the appellants to the respondents was struck off. There is thus no great dissimilarity in the cases.

In the case of *Ma Pyone* v. *Ma U* (1), I held that the invalid transfer by way of sale could, in such circumstances, be equitably pleaded and proved and was a good defence as against redemption. On the other hand, in the case of *Maung Myat Tun Aung* v. *Maung Lu Pu* (2), Lentaigne, J., held to the contrary, and decided that, in such circumstances, the redemption of the mortgage should proceed. This, I may say, is the only decision printed in the authorised Law Reports.

"The matter is of such great importance to the community at large, and is so often coming before this Court, that my opinion is that it should be referred to a Full Bench.

"On the merits, the evidence as to the alleged invalid sale was, I think, good enough to have warranted the lower Courts in holding that it was established. Neither Court, unfortunately, dealt with this point, and, therefore, a finding upon it may be necessary later on.

"Incidently, I would refer to the cases of *Ma Shwe Kin* v. *Ka Hoe* (3) and *Ma Ma E* v. *Maung Tun* (4), where, in a slightly different case, but one involving similar principles, Carr, J., and I have come to diametrically opposite conclusions.

"I would, therefore, refer to a Full Bench, if the Hon'ble Chief Justice agrees with me, the following question:

"When there is a registered simple mortgage of land, and a subsequent transfer of possession of the land to the mortgagees without a document by the mortgagors, and the latter assert that this was under the original mortgage, whilst the former plead that it was a fresh transaction amounting to an outright, but invalid, sale to them, can the mortgagees, in a suit by the mortgagors for redemption of the mortgage, plead and prove this invalid sale, in equity, and as a shield, or must the mortgage prevail and redemption be allowed"?

Mr. *Thein Maung* I, for the Appellants.

(1) 77 Ind. Cas. 877; 2 Bur. L. J. 233; A. I. R. 1924 Rang. 89.

(2) 89 Ind. Cas. 875; 3 R. 243; A. I. R. 1925 Rang. 322

(3) 84 Ind. Cas. 514; 3 Bur. L. J. 211; A. I. R. 1924 Rang. 381.

(4) 84 Ind. Cas. 517; 3 Bur. L. J. 214 2 R. 479; A. I. R. 1925 Rang. 119[1]

OPINION OF THE FULL BENCH.

Rutledge, C. J.—Mr. Justice Duckworth has made the following reference:—

"Where there is a registered simple mortgage of land, and a subsequent transfer of possession of the land to the mortgagees without a document by the mortgagors, and the latter assert that this was under the original mortgage, whilst the former plead that it was a fresh transaction amounting to an outright, but invalid, sale to them, can the mortgagee in a suit by the mortgagors for redemption of the mortgage plead and prove this invalid sale in equity and as a shield or must the mortgage prevail and redemption be allowed?"

The learned Judge states that the matter is of great importance and is often coming before the Court. In this I agree with him. The well-known unbusiness like methods of the bulk of the agricultural population in neglecting to comply with the provisions of the Transfer of Property Act and the Indian Registration Act coupled with the great rise in the value of land during the past quarter of a century, has given rise to a great volume of litigation and has provided a field for the activities of the speculator in litigation. Consequently any question like the present is of great practical importance.

A simple mortgage is defined in s. 58 (*b*) of the Transfer of Property Act: "Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgaged money, agrees, expressly or impliedly, that in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage." It will be seen from this that the outstanding characteristic of a simple mortgage is that possession remains with the mortgagor. And if possession subsequently passes to the mortgagee that possession is not explained or accounted for by the simple mortgage instrument. If the transaction in the course of which possession was given is not evidenced by a registered instrument, the onus of proving what that transaction was, lies on the person who is not in possession. To change a simple mortgage into a usufructuary mortgage is such a varying and adding to its

erms that it would require, within the meaning of s. 92 of the Evidence Act, a new registered instrument as it would to change a simple mortgage into a sale out and out.

We have been referred to in the reference, and learned Counsel for the appellant has relied strongly upon, a decision of Lentaigne, J., in *Maung Myat Tun Aung* v. *Maung Lu Pu* (2). The mortgage in that case appears to have contained a clause empowering the mortgagees to take possession of the land and to sell the same in the event of the mortgagor making any default in payment. As I construe this clause the possession can only be taken for the purpose of exercising a power of sale and not for the purpose of enjoying the rents and profits thereof and applying them to the payment of interest and capital. With regard to the law of part performance and the equities that arise thereon where the Specific Relief Act gives no assistance I prefer the language approved by their Lordships of the Privy Council that the acts relied on as part performance must be "unequivocally referable to the c ntract and productive of alteration of circumstances, loss or inconvenience, though not irretrievable." I am unable to agree with Lentaigne, J., where he goes on to say in the abovementioned case: "In all such cases the possession of the mortgagee would ordinarily be referable to his mortgage, or in the case of a simple mortgage, to his influence over the mortgagor by reason of such mortgage and consequently to the mortgage. That would be the position, I think, in the case of an ordinary simple mortgage; but it is still more so in a case like the one now before me, where the mortgage-deed confers an express power to enter into possession even for the limited purpose of effecting a sale to third parties." As I have already stated the power to enter into possession was merely for the purpose of sale and not to enjoy the rents and profits in lieu of interest and cannot be referable to any such agreement. If we are to construe possession subsequently taken in the case of a simple mortgage to some supposed influence of a mortgagee over his mortgagor, and by an artificial construction of the provisions of the Evidence Act, shut out all evidence of an agreement for sale, in view of the social and economic conditions of this Province referred to earlier in this judgment, I feel convinced that a great and lamentable impetus will be given to fraudulent suits at the instance of speculators.

A subsequent agreement of sale does not, and does not purport to, rescind or modify the mortgage, but merely purports to satisfy it. In the case of an agreement for sale a Full Bench of the late Chief Court in *Karamath Khan* v. *Latchmi Atchi* (5) held that a defendant may plead by way of defence to a suit for eviction by an owner that he is in possession under a contract to sell and that if he can prove the contract and it still subsists, it will be a valid defence, however valuable the property may be, and whether he has a registered-deed of transfer or not.

In *Venkatesh Damodar* v. *Mallappa Bhimappa* (6) a Bench (judgment being delivered by the late Chief Justice Macleod) held that where a defendant in possession had paid the full purchase price but had omittled to get a registered sale-deed and his right to specific performance had become barred, he was entitled to remain in possession as against the plaintiff.

Karamath Khan's case (5) was reviewed and confirmed by a Full Bench of this Court in *Maung Myat Tha Zan* v. *Ma Dun* (7). Prefacing his review of the authorities, the late Chief Justice observes at page 302*: "The decisions are based, some, on principles of equity (the equity of part performance), some, on the ground that the Court would not lend itself to aid the plaintiffs in effecting a fraud, and some, on the ground of fiduciary relation which was created between the parties by the facts. In my opinion the case might be adequately disposed of on any one of these grounds." And later on page 303*, "Returning to the ground of fraud, I think there can be no doubt that an attempt by the plaintiffs in this case to go back upon the contract itself after having received the purchase price, and after possession had been given, clearly amounts to an attempt at fraud which the Courts in this country cannot and should not aid." These observations are very pertinent to cases like the present and may well be borne in mind, where a subsequent agreement to

(5) 61 Ind. Cas. 675; 10 L. B. R. 241; 13 Bur. L. T. 119 (F. B.).

(6) 65 Ind. Cas. 868; 46 B. 722; 24 Bom. L. R. 242; A. I. R. 1922 Bom. 9.

(7) 81 Ind. Cas. 857; 2 R. 285; A. I. R. 1924 Rang. 214; 3 Bur. L. J. 78 (F. B.).

*Pages of 2 R.—[*Ed.*]

sell followed by possession is set up in cases of redemption of simple mortgages. It is clear that it is open to the mortgagor to enter into a contract subsequent to the mortgage for the sale of the mortgaged premises to the mortgagee [*Kanhayalal* v. *Narhar* (8), *Lisle* v. *Reeve* (9) and *Reeve* v. *Lisle* (10)]. But the agreement must be a separate transaction from the mortgage.

In *Maung Shwe Hmon* v. *Maung Tha Byaw* (11) Mr. Justice Pratt had before him a case not unlike the present. At page 465* the learned Judge states: "In the present case the position is that after the mortgagees had assigned the mortgage to Maung Po Hlaing, the mortgagors made over the land in suit to him under an agreement to sell for a fixed sum due under the mortgage. Their intention clearly was by the transfer to extinguish that portion of the mortgage-debt. They cannot now be allowed to take advantage of the fact that they neglected to give a conveyance in due form and redeem the land. To give plaintiffs a decree would be in effect to assist the vendors in perpetrating a fraud on the vendee."

In the unreported case of *Po Cho* v. *Paw Saing*, Civil Second Appeal No. 299 of 1924, a Bench of this Court consisting of my brother Heald and myself held that an agreement to sell the mortgaged property outright to the mortgagee is a good defence to a suit for redemption. At page 4 of the judgment the reasons are given as follows:—

"If the original transaction be regarded as a non-possessory mortgage, then although the consideration might be regarded as being nothing more than the amount due on the mortgage, the so-called rent being regarded as interest, there would be transfer of possession. There would also in either case be the equitable right of the transferee to obtain a legal conveyance. As for the ground of fraud, it would be clearly fraudulent for the transferors who had discharged their debt by the agreement to sell and by delivery of possession, to repudiate the agreement and to claim redemption at a time when the debt, or at any rate, the debt for rent, would be irrecoverable. Similarly, since transferors who have entered into an agreement to sell and have received consideration may be regarded as holding the legal title in trust for the transferees, it would amount to allowing a violation of a fiduciary obligation to allow them to repudiate the agreement for sale. Personally, I would base the decision on the ground of fraud and would hold that it is clearly fraudulent that mortgagors who have agreed to sell the equity of redemption to the mortgagees so as to put an end to the mortgage and to make the original mortgagees owners of the property, and as consideration for that agreement have accepted from the transferees a release of debts due by them, should repudiate their agreement and should claim to redeem the property as if the agreement had never been made."

These are the words of my colleague with which I fully concurred at the time (*i. e.*, 10th June, 1925) and I see no reason to doubt their soundness at the present time after further consideration.

My answer to the Reference is that the defendant is entitled to plead and prove an agreement to sell in pursuance of which possession was given and if he proves the same it is a complete answer to the plaintiff's suit for redemption.

I wish to make it clear that my opinion is confined to non-possessory mortgages. For obvious reasons different considerations may apply in the case of usufructuary mortgages.

Heald, J.—I have had the advantage of reading the learned Chief Justice's judgment, and as he has pointed out I have already in the case of *Po Cho* v. *Paw Saing* expressed my opinion on the subject-matter of the reference. I do not agree with the view taken by Lentaigne, J., in the case of *Maung Myat Tun Aung* v. *Maung Lu Pu* (2) that a contract of simple mortgage explains the mortgagee's possession of the mortgaged property. On the contrary I agree with the learned Chief Justice that such possession cannot be referred to such a contract. Under a simple mortgage the mortgagor must be in possession of the mortgaged property, and if he is out of possession that fact is referable not to the contract of simple mortgage but to some other transaction. It may be doubtful whether or not the burden of proving the nature of that transaction is on the mortgagor, who is out of possession but

(8) 27 B. 297; 5 Bom. L. R. 140.
(9) (1902) 1 Ch. 53; 71 L. J. Ch. 42; 50 W. R. 231; 85 L. T. 464; 18 T. L. R. 61.
(10) (1902) A. C. 461; 71 L. J. Ch. 768; 87 L. T. 308; 18 T. L. R. 767; 51 W. R. 576.
(11) 72 Ind. Cas. 6; 11 L. B. R 462; A. I. R. 1923 Rang. 125.

*Page of 11 L. B. R.—[*Ed.*]

I have no doubt that the mortgagee is entitled to prove that the transaction which resulted in the change of possession was an agreement for sale and that proof of such an agreement is a good defence to a suit by the mortgagor to recover possession by redemption of the mortgage.

I, therefore, concur in the answer to the reference given by the learned Chief Justice.

Carr, J.—I concur in the answer of the learned Chief Justice to the question referred. This answer seems to me to follow necessarily from the decision in *Maung Myat Tha Zan* v. *Ma Dun* (7). The only difference between the essential facts of the two cases is that in the present case the sale or agreement for sale, was preceded by a simple mortgage, in which the subsequent vendor was the mortgagor and the subsequent vendee the mortgagee. In my opinion that makes no difference whatever. I agree with the learned Chief Justice that the simple mortgage does not account for the subsequent transfer of possession and that Lentaigne, J., was wrong in holding in *Maung Myat Tun Aung* v. *Maung Lu Pu* (2) that it did. I think that the learned Judge in that case erred in applying the English rule in view of the great difference between an English mortgage and a simple mortgage.

The questions of the conflict between the decisions in *Ma Shwe Kin* v. *Ka Hoe* (3) and *Ma Ma E* v. *Maung Tun* (4), and of the admissibility of evidence, do not arise on the Reference, and I express no opinion on them.

Duckworth, J.—I concur with the judgment written by the learned Chief Justice.

To my mind, the answer to the question referred by me is that the mortgagees can, in the circumstances stated, plead in equity that the invalid sale, as involving an agreement to sell, is a shield, and can prove it.

My reasons are that there has admittedly been a change of possession, which cannot be directly attributed to the registered simple mortgage. The mortgagees are, therefore, not alleged to be mere trespassers, and the onus rests, in the first instance, upon the plaintiffs who plead the conversion of the simple mortgage into an usufructuary mortgage.

When I wrote the order of reference, I was under the impression that the plaintiffs could prove this alleged usufructuary mortgage; inasmuch as all that was involved was a change of possession under the already existing mortgage. But it involved, as a matter of fact, a change or variation of the original simple mortgage, and, therefore, evidence was not admissible to prove it under s. 92, proviso 4 (or any other proviso) of the Evidence Act, unless it was in writing, and registered. I am convinced that the opinion expressed by me, in the Order of Reference on this point, was erroneous. The Full Bench case of *Maung San Min* v. *Maung Po Hlaing* (12) also supports this view.

On the other hand, the defendants were in a position to prove the agreement to sell which did not require writing, or registration. There is a series of rulings in this, and other Courts, which establishes this point clearly. The decisions are based on considerations of equity, part performance, prevention of fraud and the fiduciary aspect of the vendor's position, coupled with the impropriety of permitting him to succeed against his vendee, in a suit for possession. The decisions of this Court culminate in the Full Bench case already quoted by me above, but I would particularly call attention to an unpublished decision of a Bench of this Court, consisting of the learned Chief Justice and Sir Benjamin Heald, J., in the case of *Maung Po Cho* v. *Maung Paw Saing*, Second Civil Appeal No. 299 of 1924.

I concur entirely in that decision.

There the facts were stated to be as follows:

The plaintiffs alleged that under a registered deed of mortgage Maung Po Tein mortgaged to the defendants a piece of land, *with possession*, and that the plaintiffs purchased the land from Maung Po Tein by a registered conveyance. They then sued defendants for redemption.

The defendants admitted that the land originally belonged to Maung Po Tein and that it was mortgaged to them usufructuarily. They, however, contended that, later on Maung Po Tein made over the land to them absolutely for the amount due on the mortgage, together with rent due by him as their tenant.

Even here, where there was no change of possession, the invalid sale, by Po Tein

(12) 94 Ind. Cas. 567; 4 R. 1; A. I. R. 1925 Rang. 91; 4 Bur. L. J. 118.

to the defendants, was allowed to be proved and in order to prevent fraud, to prevail.

The conclusion arrived at confirms the view, which I took in the case of *Ma Ma E* v. *Maung Tun* (4).

A decision, which assists considerably in the matter of this reference is that of Pratt, J., in *Maung Shwe Hmon* v. *Maung Tha Byaw* (11.)

It is clear that whatever the transaction was which led to the mortgagees obtaining possession of the land, the possession was traceable to that transaction, and not to the registered simple mortgage. As stated, it cannot be shown that the simple mortgage was converted into an usufructuary mortgage, but it can be shown that the mortgage was satisfied, and that possession changed, in virtue of an agreement to sell which was duly acted upon by part performance.

Part performance is constituted not only by payment but by change of possession.

Thus I consider that, in the case under reference, the defendants can plead and prove the subsequent oral agreement to sell, which amounted to an entirely new transaction, in order to set it up as a shield against redemption of the simple mortgage.

I think that the case of *Maung Myat Tun Aung* v. *Maung Lu Pu* (2) was wrongly decided by Lentaigne, J., and that the application of the principles enunciated by him in that judgment would give a greater impetus than ever to fraudulent suits by speculators.

In order to render my position clear, I would refer to the case of *Ma Pyone* v. *Ma U* (1).

I do not think that anything more need be said.

JUDGMENT.

Maung Ba, J.—(*September 1, 1926*)—The appellants sought to recover possession of a piece of paddy land by redemption. The transaction started as a simple mortgage effected by a registered deed. About a year afterwards the mortgagee was put in possession of the land. There was no document evidencing such change of possession. As usual we have two divergent versions. The appellants allege conversion of a simple into usufructuary mortgage while the respondents allege outright sale. The transfer took place about 14 years before the institution of the suit.

The lower Courts have never considered the question of adverse possession. My brother Duckworth referred to a Full Bench the following question:—

"Where there is a registered simple mortgage of land and a subsequent transfer of possession of the land to the mortgagees without a document by the mortgagors and the latter assert that this was under the original mortgage whilst the former plead that it was a fresh transaction amounting to an outright but invalid sale to them, can the mortgagees in a suit by the mortgagors for redemption of the mortgage plead and prove this invalid sale in equity and as a shield, or must the mortgage prevail and redemption be allowed?"

The answer of the Full Bench was "that the mortgagee is entitled to plead and prove an agreement to sell in pursuance of which possession was given, and if he proves the same it is a complete answer to the mortgagor's suit for redemption."

It is, therefore, only necessary to find out whether the respondents have proved such an agreemont to sell. After perusing the evidence I am satisfied that they have proved the same. This finding will dispose of the appeal. I wish, however, to add that apart from this it would appear that for want of a registered instrument proviso (4) to s. 92 of the Indian Evidence Act, would preclude the appellants from proving the usufructuary mortgage alleged by them.

In the result the appeal must be dismissed.

Reference answered accordingly.

A. N. A. *Appeal dismissed.*

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 2749 OF 1925.

November 15, 1926.

Present:—Mr. Justice Jai Lal.

GHULAM HUSAIN—APPLICANT—APPELLANT

versus

RAMESHWAR DAS AND OTHERS—DEFENDANTS—RESPONDENTS.

Provincial Insolvency Act (V of 1920), s. 10—Right to file petition—Joint debts for over Rs. 500, sufficiency of—Fraudulent transfer, question of, when to be considered.

A debtor is entitled to present an application for insolvency if he can show that the debts payable by him whether alone or jointly with others amount to more than Rs 500.

Questions relating to alleged fraudulent transfers by the debtor do not arise at the time he is to be declared insolvent but are more appropriately to be determined when the question arises for realising his assets.

Miscellaneous first appeal from an order of the District Judge, Jhelum, dated the 22nd July, 1925.

Mr. *Shambu Lal*, for Dr. *Mohammad Alam*, for the Appellant.

Mr. *Gobind Ram Khanna*, for the Respondents.

JUDGMENT.—The appellant presented an application for being adjudicated an insolvent. He alleged that his debts amounted to Rs. 3,265 out of which Rs. 1,695 were alleged to be due jointly from himself and his brother. He stated that he was unable to pay these debts and the only property of any value that he showed in his list of assets is $\frac{1}{3}$rd share in 56 *kanals* 17 *marlas* of land which was alleged to have been mortgaged by him to Mohammad Waris for Rs. 913. This Mohammad Waris is a brother-in-law of the appellant. Another ground in support of the application was that the appellant had been arrested in execution of a decree. No issue, however, was framed on this last ground of the application and consequently no evidence was led in support of it.

The District Judge held that the only debts that could be taken into consideration in determining the amount of debts due from the applicant were the debts due from him alone and not those that were due jointly from him with others. He came to the conclusion that the only amount that had been proved to be due from him alone was about Rs. 300 due to Lakhmi Das creditor who was examined in Court and stated that he had instituted a suit for Rs. 500 against the applicant and his brother jointly and for Rs. 300 against the former alone. In my opinion the applicant is entitled to present an application for insolvency if he can show that the debts payable by him whether alone or jointly with others amount to more than Rs. 500. This is practically the only ground on which the District Judge has dismissed the application as he has practically given no finding as to the value of the assets of the applicant. In any case there was the further ground that the applicant was under arrest and this is proved by a copy of the warrant of arrest with the report thereon which he filed with the memorandum of appeal. I consider that there are good grounds for accepting the copy at this stage because the District Judge did not frame an issue on the point. There are *prima facie* grounds to hold that the applicant is unable to pay his debts. I hold that Ghulam Husain has proved that he was entitled to present an application for insolvency and should, therefore, have been adjudicated an insolvent.

I accept this appeal and adjudicate the applicant an insolvent and remand the case to the District Judge to proceed with the insolvency proceedings in accordance with law. The questions relating to the alleged fraudulent transfers by the applicant do not really arise at this stage. They are more appropriate for determination when the question arises of realising his assets. There will be no order as to costs of this appeal.

R. L. *Appeal accepted.*

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 114 OF 1925.

September 14, 1926.

Present:—Mr. Justice Devadoss and Mr. Justice Sundaram Chetty.

MARIMUTHU GOUNDAN AND OTHERS—DEFENDANTS NOS. 1 AND 2—APPELLANTS

versus

MUNIAMMAL AND OTHERS—PLAINTIFF AND DEFENDANTS—RESPONDENTS.

C. P. C. (Act V of 1908), s. 11, Expl. IV—Suit for exclusive possession—Decree for joint possession—Plaintiff, right of, to put forward exclusive title in subsequent suit—Res judicata—*Discretion to decide point—Decision*—Res judicata—*Minor—Negligence of next friend—Omission to take defence, effect of.*

Where in a suit by the plaintiffs for recovery of certain properties alleging that they belonged to one *M* and claiming title under him, it was held that the properties belonged in common to *M* and his wife and after the death of the latter to her daughters, the daughters were directed to be added as party defendants, and a decree for possession was given in favour of the plaintiffs and such daughters:

Held, that it was not competent to the plaintiffs in a subsequent suit to put forward a case of sole ownership as against the daughters and rely upon an arrangement by which they were precluded from claiming any share in the property inasmuch as such a plea might and ought to have been put forward in the prior suit itself and having failed to do so, the plaintiffs were debarred by *res judicata* from raising any question of exclusive ownership in a subsequent suit. [p. 527, cols. 1 & 2.]

In considering whether the next friend of a minor plaintiff was grossly negligent or not the Court must take into consideration the circumstances under which contentions were raised by the parties in the suit and where there is nothing on record to show that the next friend of the plaintiff either wilfully or negligently omitted to raise a contention which he could very well have raised in that suit, the minor is bound by the result of the decision in the suit. [p. 527, col. 2.]

Obiter.—Explanation IV to s. 11, C. P. C., would not apply to a point which the Court has a discretion to decide or not. [p. 527, col. 1.]

Letters Patent Appeal against the judgment of Mr. Justice Wallace, in S. A. No. 840 of 1921, presented to the High Court against the decree of the Court of the First Additional Subordinate Judge, Coimbatore, in A. S. No. 104 of 1920 (A. S. No. 161 of 1920, District Court, Coimbatore), preferred against that of the Court of the Principal District Munsif, Erode, in O. S. No. 307 of 1919.

Mr. *K. S. Krishnaswami Iyengar*, for the Appellants.

Mr. *L. A. Govinda Raghava Iyer*, for the Respondents.

JUDGMENT.—The first point urged in this appeal is that the decision in O. S. No. 937 of 1910 as regards joint ownership of Mottayya Goundan and Ayyammal is not *res judicata* between the parties in this case. This point was given up by the learned Vakil who argued the second appeal before the learned Judge but Mr. Krishnaswami Iyengar presses it before us. In O. S. No. 937 of 1910, the minor grandsons of Mottayya Goundan, who are defendants Nos. 1 and 2 here, brought a suit for possession of the property from defendants Nos. 1 and 2 therein, one of whom claimed to be the lessee from Mottayya Goundan. The case of the plaintiffs was that the whole of the property belonged to Mottayya Goundan and that Mottayya Goundan had released his right in their favour and that they were, therefore, entitled to possession of property. Defendants Nos. 1 and 2 set up the title of third persons.

In second appeal, this Court observed that the suit property was the joint property of Ayyammal and her husband Mottayya Goundan and that Mottayya Goundan's possession should be deemed not adverse to his daughters who were co-owners with him (Ayyammal being dead) and directed the District Munsif to make the daughters of Ayyammal parties to the suit and pass a decree in accordance with law. In obedience to this direction, the District Munsif made the three daughters of Ayyammal defendants to the action and passed a decree for joint possession in favour of the plaintiffs and defendants Nos. 3 to 5. Defendants Nos. 3 to 5 remained *ex parte*. The question now is whether this decree operates as *res judicata* in the present suit as regards the question of joint ownership of Mottayya Goundan and Ayyammal. What is urged by Mr. Krishnaswami Iyengar is that the question as to joint ownership was not raised in the case as defendants Nos. 3 to 5 were practically plaintiffs in the action and there was no contest *inter se* between the plaintiffs and that, therefore, this question could not be said to have been decided in that suit. The High Court found that Ayyammal and her husband, Mottayya Goundan, were joint owners of the property and that Mottayya's possession was possession on behalf of the daughters who were co-owners. As regards this point, the District Munsif could not have given a decision against the view of the High Court, but the plaintiffs could have put forward the plea that though half of the property was the property of Ayyammal, yet by an arrangement evidenced by Ex. V, which was brought about by Mottayya Goundan the daughters were debarred from claiming any interest in the plaint property. Such a defence was open to them and that defence was not put forward. The question is whether Expl. IV to s. 11 of the C. P. C. governs this case. We think that it was not only open to the plaintiff in O. S. No. 937 of 1910 to have put forward that plea but they ought to have put it forward in order to meet the case that the daughters were co-owners with regard to the suit property. Under s. 11, Expl. IV, any matter which might and ought to have been made a ground of defence or attack shall be deemed to have been a matter directly and substantially in issue. Seeing that the plaintiffs claimed title to the whole of the suit property in O. S. No. 937 of 1910, they ought to have put forward the contention that the daughters were precluded from claiming any share in the property by virtue of the arrangement come to subsequent to the death of Ayyammal. They not having done so, this point must be deemed to have been decided against them and, therefore, the decision in O. S. No. 937 of 1910 operates as *res judicata* as regards the ques-

tion of joint ownership of Mottayya Goundan and Ayyammal's daughters.

Subhan Ali v. *Amami Begum* (1) is relied upon by Mr. Krishnaswami Iyengar as supporting his contention. In that case, their Lordships of the Privy Council held that the decision in a suit for a share of the profits was not *res judicata* in a subsequent suit for partition. An observation of their Lordships at page 303* would show that the point was not one which would come within Expl. IV of s. 11:—

"In that suit partition was not asked for, and their Lordships prefer in these appeals to deal with the question of partition as one which was not there decided, because it was not raised. There are grounds on which a decree of partition might have been refused to the plaintiffs even by a Court which interpreted the grant as did the Additional Judicial Commissioners in that suit. In their judgment accordingly there can be no question of *res judicata* in the plaintiffs' favour so far as their claim to partition is concerned."

When it is discretionary with the Court to decide a point or not Expl. IV to s. 11 would not apply to a point which the Court may or may not decide in its discretion. This point was dealt with by one of us in a recent judgment [*Yennamani Rammanna* v. *Masunari Venkatanarayana* (2)]. We, therefore, hold that *Subhan Ali* v. *Amami Begum* (1) has no application to the present case.

It is next urged that the next friend of the plaintiffs in O. S. No. 937 of 1910 was negligent and, therefore, the decree in that suit is not binding on them. Mr. Krishnaswami Iyengar puts forward two points to show that the next friend was grossly negligent. One is that the documents Exs. V, VI and VII were before the Court and if the next friend had looked at Ex. V, he could have put forward the case that there was an arrangement with regard to the property binding on the daughters which would preclude them from claiming a share in the suit lands. The second is that the next friend was the husband of one of the daughters and, therefore, he must be deemed to have acted against the interests of the minors. We are unable to see anything in these points. The contention of the plaintiffs in that suit was that the whole of the property belonged to them and no part of it belonged to Ayyammal. The next friend might have thought that he could not very well have put forward the alternative case that, granting that half of the property belonged to Ayyammal, by virtue of an arrangement come to, the daughters had accepted the two houses as their share and released their right to the rest of the property. In considering whether the next friend was grossly negligent or not we must take into consideration the circumstances under which contentions were raised by the parties in the suit. There is nothing on record to show that the next friend of the plaintiffs either wilfully or negligently omitted to raise a contention which he could very well have raised in that suit. This point, therefore, also fails.

The next point urged is that the learned Judge has erred in giving a share of only the actual sale-proceeds of the two houses sold by the daughters of Ayyammal. The contention is that co-owners when they alienate any portion of joint property are bound to account for the property at its market rate on the date of the plaint. In other words, the value of the property should be taken not as it was when they dealt with the property but as it was on the date when the plaint was filed, in which the partition is sought. This contention must fail for, if Ex. V is treated as a settlement, under it, Mottayya Goundan released his right in favour of the daughters. The finding is that the property was the self-acquisition of Mottayya Goundan and Ayyammal. Ayyammal being dead, her share devolved on her daughters in preference to her son, and the half share in the house belonging to Mottayya Goundan was at his absolute disposal. He having given his share or settled his share upon the daughters, the grandsons who had no interest in the property at the time when it was settled upon the daughters cannot dispute that transaction. That being so, it is difficult to see how the daughters could be asked to bring into hotch-pot the property which they acquired from Mottayya Goundan who made a gift of it to them. Equity would arise if the grandsons, that is defendants Nos. 1 and 2 herein, had an interest in the houses and if under an arrangement they had relinquished their right in the houses and if the daughters of Mottayya

(1) 88 Ind. Cas. 347; 52 I. A. 294; 23 A. L. J. 667; A. I. R. 1925 P. C. 184; (1925) M. W. N. 535; 21 N. L. R. 117; 30 C. W. N. 122; 52 C. 971; 50 M. L. J. 136 (P. C.).

(2) 99 Ind. Cas. 468.

*Page of 52 I. A.—[*Ed.*]

Goundan had relinquished their rights in the lands and if the daughters had sold them to their prejudice, then they might be required to account for the value of the houses at the time of partition of the joint property. In this case, defendants Nos. 1 and 2 were not entitled to dispute the arrangement made by Mottayya Goundan and, therefore, no equities arise between them and the daughters of Mottayya Goundan. In this view, defendants Nos. 1 and 2 are not entitled to any equities against the plaintiffs or against her sisters. This portion of the decree not having been appealed against by the respondents, we do not interfere with the direction in it.

In the result, the Letters Patent Appeal is dismissed with costs.

V. N. V. *Appeal dismissed.*

Advocate High Court
Jammu & Kashmir
Srinagar

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 887 OF 1924.

November 23, 1926.

Present:—Mr. Justice Ashworth.

RAJA RAM—DEFENDANT—APPELLANT

versus

Babu NARAIN DAS AND OTHERS—PLAINTIFFS—RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 194—Sir *land—Sale—Ex-proprietary tenancy—Vendee's right to sue without impleading other co-sharers*—Res judicata—*Omission to resist plaintiffs' right to sue alone—Right to sue, whether becomes* res judicata—*Erroneous decision of law, whether can operate as* res judicata.

The vendor of a share in a village who becomes an ex-proprietary tenant in respect of his *sir* land, is a tenant of the whole body of co-sharers and not merely of his vendees. [p. 529, col. 1.]

Debi Pershad v. *Bhagwan Din* (1), followed.

By virtue of the provisions of s. 194 of the Agra Tenancy Act a co-sharer is not entitled to sue for rent without joining the other co-sharers in the absence of a local custom or special contract entitling him to collect the rent and to sue for it alone. [*ibid.*]

Where in a suit by a co-sharer for rent for a particular year, the defendant omits to plead that the plaintiff is not entitled to sue alone without impleading the other co-sharers also, and the suit is decreed, the plaintiff's right to sue becomes *res judicata* and the tenant cannot resist a suit for rent for a subsequent year on the ground that the plaintiff alone has no right to sue. [*ibid.*]

An erroneous decision on a question of law may operate as *res judicata*. [*ibid.*]

Second appeal against a decree of the Second Additional District Judge, Gorakhpur, dated the 19th February, 1924.

Mr. *Shiva Prasad Sinha*, for the Appellant.

Mr. *R. K. Malaviya*, for the Respondents.

JUDGMENT.—This second appeal arises out of a suit brought by the plaintiffs-respondents against the defendants-appellants for rent of a holding. The plaint sets forth that the plaintiffs are the *zemindars* of the village and that the defendant No. 1 is an ex-proprietary tenant and the other defendants his sub-tenants. The defendants resisted the suit on the plea amongst others that the plaintiffs were only co-sharers and could not bring the suit without joining the other co-sharers. The Assistant Collector allowed this plea and dismissed the suit. He held that as a previous suit by the plaintiffs on the same cause of action had been admittedly dismissed it must be held that it had been decided once for all that the plaintiffs alone could not sue, this former decision operating under the rule of *res judicata*. He also held that if the point was open to proof there was sufficient evidence that there were other co-sharers.

In first appeal the Additional District Judge found that no previous suit had decided that the plaintiffs were not entitled to sue without joining the other co-sharers and that there was no admission of the plaintiffs of such a previous decision. On the contrary, by referring to the previous litigation, he found that the question of the plaintiffs being able to sue alone had been decided in their favour and that this decision operated as *res judicata*. Accordingly he allowed the appeal and decreed the suit.

It may be remarked that on the allegations in the plaint no decree should have been granted against any of the defendants except defendant No. 1. According to the plaintiffs the defendant No. 1 was the ex-proprietary tenant and the other defendants his sub-tenants. There being no contract between these other tenants and the plaintiffs, no claim for rent against these sub-tenants would lie; but the lower Court's decree is not appealed against on this ground and, therefore, it is unnecessary to interfere with the decree on this ground.

Three points are taken in the grounds of appeal. The first is that the suit was not maintainable under s. 194 of the Tenancy Act by the plaintiffs alone. It is common ground that the defendant No. 1 is an ex-proprietary tenant in this land

which was his *sir* land before he sold his share to the plaintiffs. It has been ruled by a Full Bench of this Court in *Debi Pershad* v. *Bhagwan Din* (1) that in such a case the vendor of a share in the village who becomes an ex-proprietary tenant in respect of his *sir* land is a tenant of the whole body of co-sharers and not merely of his vendees. I agree with this ruling and in any case I am bound to follow it. There was reliable evidence that there were other co-sharers. Under s. 194, therefore, of the Tenancy Act II of 1901 the plaintiffs were not entitled to sue without joining the other co-sharers in the absence of a local custom or special contract entitling them to collect the rent alone from this holding and to sue for the rent alone. But the lower Court has held that it is not permissible to go into this question by reason of a previous decision in a similar suit for rent, wherein the defendants failed to resist the suit on the plea that the plaintiffs were not entitled to sue alone and in consequence had a decree for rent passed against them. I am of opinion that the lower Court is right in holding the matter to be settled under the rule of *res judicata*. It has been argued by the appellants' Counsel that the failure of the defendant No. 1 to pay rent for the years in suit furnished a different cause of action to that furnished by their failure to pay rent for other years in the previous suit. This argument ignores the fact that under s. 11 of the C. P. C. it is only necessary that the previous decision should have settled a matter directly and substantially in issue. This expression is not synonymous with a cause of action. For instance a question of jurisdiction may be *res judicata* but it cannot be a cause of action. Apparently in the previous suit the defendants did not plead that the plaintiffs could not sue alone but it is clear that they might and ought to have made this plea a ground of defence. They lost the suit by failing to do so. The question, therefore, of the maintainability of the suit by the plaintiffs alone has been decided against the defendants and this decision is binding on the defendants under the rule of *res judicata*. It makes no difference that the previous decision may have been a wrong decision in point of law. A Court with jurisdiction to try a matter has jurisdiction to decide it wrongly even against a clear section of a Statute and, if it so decides it wrongly, its decision may operate as *res judicata*. Likewise, where the point is not decided because the plea raising the issue was not raised when it ought to have been raised the Court will be deemed to have decided the matter against the defendants.

A second point taken in appeal is that the claim by the plaintiffs was barred by *res judicata*. The Counsel of the defendants-appellants has argued that on an admission by the plaintiffs' agent it should have been held that the matter was *res judicata* in favour of the defendants. The lower Appellate Court has given good reasons for rejecting this plea. He points out that all that the plaintiffs' agent admitted was that a previous suit had been dismissed. This previous suit was not the suit for rent relied on by the plaintiffs as barring the defendants' plea under the rule of *res judicata*. It was a suit for ejectment and the fact that the Court refused to eject in pursuance of a decree for rent obtained could in no way operate against the plaintiffs in the present suit. The plaintiffs had got a previous decree for rent in a suit similar to the present one.

A third plea taken is that the whole claim for rent should not have been decreed. The meaning of this is that the plaintiffs should only have been given a decree for the proportion of rent which they as co-sharers were entitled to. A condition precedent laid down by s. 194 of the Tenancy Act for individual co-sharers getting such a proportionate decree is that the remaining co-sharers have refused to join them in the suit and have consequently been joined as defendants. These conditions have not been satisfied. The plaintiffs could not, therefore, get a decree for proportionate share. I have held above that for the purposes of this suit they were under the rule of *res judicata* entitled to claim the whole rent.

For the above reasons this appeal fails and is dismissed with costs.

A. N. A. *Appeal dismissed.*

J. N. Dar
Advocate High Court
Jammu & Kashmir
Srinagar.

(1) 16 Ind. Cas. 399; 35 A. 27; 10 A. L. J. 437.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No 287 OF 1926.

September 8, 1926.

Present:—Mr. Justice Krishnan.

KANTIMAHANTI RAMAMURTHI AND ANOTHER—PETITIONERS

versus

THE SPECIAL DEPUTY COLLECTOR, HARBOUR ACQUISITION, VIZAGAPATAM—RESPONDENT.

Land Acquisition Act (I of 1894), s. 6, Ch. VII—Reference by Land Acquisition Officer—Judge, jurisdiction of, to inquire into legality of acquisition—Acquisition by Government on behalf of Railway Company—Declaration, form and contents of.

The land acquisition Court gets jurisdiction only on a reference being made to it by the Collector and its jurisdiction is confined to disposing of the matters so referred. It has no jurisdiction under the Act to consider the legality of the acquisition or of the reference.

Where the Government is acquiring the land itself and paying for it to the owners, the fact that they have agreed to hand over a portion of the land afterwards to a Railway Company does not render the acquisition any the less one for and by the Government, and s. 6 of the Land Acquisition Act is applicable to such a case.

It is not necessary that a declaration under s. 6 by Government for acquisition of land for a public purpose should on its face show that it is to be made out of the public revenue.

Petition, under s. 115 of Act V of 1908 and s. 107 of the Government of India Act, praying the High Court to revise an order of the Court of the Subordinate Judge, Vizagapatam, dated the 7th November, 1925, in O. P. No. 13 of 1925.

Mr. *T. Ramachandra Rao*, for the Petitioners.

Mr. *C. V. Ananta Krishnier*, Government Pleader, for the Respondent.

JUDGMENT.—There is no ground for this revision at all. The land acquisition Court gets jurisdiction only on a reference being made to it by the Collector and its jurisdiction is confined to disposing of the matters so referred. It has no jurisdiction under the Act to consider the legality of the acquisition or of the reference. A very similar case to this is reported as *Raghu Nath Das* v. *Collector of Dacca* (1) where Mukerjee, J., observes in page 615*: "It is clear from s. 18 and other sections which follow it that the question of the legality of the acquisition was never intended by the Legislature to form the subject of inquiry by the Land Acquisition Judge." I respectfully agree with that view. The civil revision petition is dismissed with costs one set for each respondent. The lower Court will proceed to dispose of the reference on the points raised in it, according to law.

As the learned Vakil for the petitioner stated that he had not had a proper opportunity to argue all the points he wanted to raise, the case was posted to be spoken to again with the consent of the learned Government Pleader. I have heard further arguments but they are all untenable and I have not altered my opinion of the case.

It was first argued that the acquisition was for the Government and the Bengal Nagpur Railway & Co., and, therefore, provisions of Ch. VII of the Act applied and that the declaration under s 6 is invalid. This is based on a misapprehension. The Government is acquiring the land itself and paying for it to the owners. The fact that they may hand over a portion of the land afterwards does not matter; the acquisition being for and by the Government, the declaration cannot be objected to. The agreement between the Government and the Company is that the former have to provide the land for the latter. Section 43 of the Act makes it quite clear that the provisions of Part VII do not then apply and under s. 6 the acquisitions could not be said to be for the Company.

It was next argued that the declaration is bad and it did not specify the particular plot of land to be acquired and it did not give the details as to the various plots owned by the various owners. Section 6, cl. (2) says what the declaration should contain and all requisites were complied with in the declaration. There was a plan prepared which showed the plot to be acquired and it was stated in the declaration when and where that plan could be inspected. The declaration cannot then be objected to.

It was then objected that the declaration does not show that any money out of the public revenue has not been attached for the acquisition. It is not contended that the acquisition is going to be made out of any funds other than the public revenue or that there has not been an allotment for this acquisition. It is not necessary that the declaration should on its face show that it is to be made out of the public revenue; s. 6 proviso does not say so.

There is no substance in any of the objections now raised. My order dismiss-

(1) 6 Ind Cas. 457; 11 C. L. J. 612.

*Page of 11 C L J.—[*Ed.*]

ing the civil revision petition with costs will, therefore, stand.

V. N. V. *Petition dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 802 OF 1924.

November 23, 1926.

Present:—Mr. Justice Iqbal Ahmad.

MUNNA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

BAIJ NATH—DEFENDANT—RESPONDENT.

Agra Tenancy Act (II of 1901), ss. 4 (5), 34, 79—U. P. Land Revenue Act (III of 1901), s. 55—Record of Rights, entries in, value of—Suit for ejectment by occupancy tenant—Relationship of landlord and tenant—Burden of proof—Wrongful ejectment by some only of co-sharers—Suit for ejectment by tenant—Limitation.

All entries in the Record of Rights including the entries made in accordance with the provisions of s. 55 of the U. P. Land Revenue Act, must be presumed to be true until the contrary is proved. [p. 531, col. 2, p. 532, col. 1.]

In a suit for ejectment, once it is proved that the plaintiff is the occupancy tenant of the land in dispute, the defendant in possession, unless he succeeds in proving that the plaintiff's right as occupancy tenant over the land in dispute has been extinguished, is liable to be treated as a tenant by virtue of the provisions of s. 34 of the Agra Tenancy Act read with s. 4 (5) of the same Act. [p. 532, col. 1.]

Section 79 of the Agra Tenancy Act has no application to a case where a tenant is ejected otherwise than in accordance with law by one of the co-sharers owning the *mahal* in which the holding in dispute is situate. [*ibid.*]

Rani v. *Aidal Singh* (1), followed.

Second appeal against a decree of the District Judge, Furrukhabad, dated the 15th February, 1924.

Mr. *P. L. Banerji*, for the Appellants.

Mr. *U. S. Bajpai*, for the Respondent.

JUDGMENT.—This is a plaintiffs' appeal and arises out of a suit for ejectment of the defendant under s. 58 of the Tenancy Act. The plaintiffs were admittedly occupancy tenants of the holding comprising the plots in dispute The plaintiffs' case was that the defendant was in possession as their sub-tenant and as such was liable to ejectment.

The defence to the suit was that the relation of landholder and tenant did not exist between the parties, and that the plots in dispute were once in possession of Kallu and Madhol, who left the village and then the defendant entered into possession of the same about six years prior to the institution of the suit in the capacity of a *zemindar*.

The trial Court held that the holding belonged to several co-sharers, and that the rent of the holding was actually realised by Chandra Shekker *Lambardar* and by another co-sharer named Raj Bahadur, and the defendant never collected any portion of the rent due in respect of the holding. It further held that there was no evidence to show that the defendant ever illegally dispossessed the tenants in possession of the plots in dispute. On these findings it held that the relation of landholder and tenant existed between the parties and decreed the plaintiffs' suit.

On appeal by the defendant the lower Appellate Court has held that "Madhol alone had no right to relinquish these plots to the defendant-appellant without the consent of his co-sharers in the holding; and it is not shown that the said co-sharers either gave such consent or subsequently ratified the relinquishment." It further went on to observe, that if it be held that the silence of the plaintiffs amounted to a ratification of the alleged relinquishment by Madhol, the plaintiffs will not be entitled to a decree for ejectment but if such a ratification could not be presumed from the circumstances of the case, then it held that the defendant's possession must be held to be wrongful, and the only remedy open to the plaintiffs in that case was a suit for ejectment under s. 79 of the Tenancy Act, and no such suit having been filed within six months from the date of possession of the defendant, the plaintiffs' remedy to recover possession of the plots in dispute had been extinguished." It further observed that there was no evidence to show that the defendant ever paid or agreed to pay rent to the plaintiffs-appellants and that "the onus was on the plaintiffs-respondents to show that the person whom they seek to eject as a tenant is in fact their tenant and this onus has not been discharged." On these grounds it reversed the decree of the trial Court and dismissed the plaintiffs' suit.

In my opinion, the decree of the lower Appellate Court cannot be supported. It is common ground that the defendant-respondent is recorded as a sub-tenant in the Record of Rights and all entries in the Record of Rights including the entries made in accordance with the provisions of s. 55 of the Land Revenue Act must, in accordance with the provisions of s. 57 of the

same Act, be presumed to be true until the contrary is proved. In the present case there was nothing to show that those entries were wrong.

Further it being admitted that the plaintiffs were once the occupancy tenants of the said plots the defendant, unless he succeeds in proving that the plaintiffs' right as occupancy tenants of the plots in dispute has been extinguished, is liable to be treated as a tenant in accordance with the provisions of s. 34 of the Tenancy Act read with s. 4 (5) of the same Act. Even if it be presumed that the defendant occupied the land without the consent of the plaintiffs-appellants he was liable to pay the rent payable in the previous years or at such rate as the Court determined to be fair and equitable, and as such the defendant was a person by whom the rent was payable and was a tenant of the plaintiffs.

It only remains to observe that the decision of the lower Appellate Court that the only remedy of the plaintiffs was by a suit under s. 79 of the Tenancy Act cannot be supported in view of the decision of this Court reported as *Rani* v. *Aidal Singh* (1). It is admitted that the defendant is only one of a body of co-sharers owning the *mahal* in which the holding in dispute is situate and as such even if he ejected a tenant otherwise than in accordance with the provisions of the Tenancy Act, s. 79 of the Tenancy Act will have no application.

For the reasons given above I hold that no valid defence was available to the defendant in the present suit and the suit was rightly decreed by the trial Court.

The result is that I allow the appeal, set aside the decree of the lower Appellate Court and restore the decree of the Court of first instance with costs in all Courts.

Appeal allowed.

A. N. A.

(1) 78 Ind. Cas. 1041; 22 A. L. J. 113; A. I. R. 1924 All. 431; L. R. 5 A. 37 Rev.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No 1839 OF 1923.

September 2, 1926.

Present:—Mr Justice Devadoss.

ISMALA ROWTHER—PLAINTIFF—APPELLANT

versus

SADASIVA ASARI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 47—Suit for possession by successful party in proceedings under s. 145, Cr. P. C., limitation of—Possession of party dispossessed within two months before date of preliminary order, declaration as to, effect of.

Article 47 of the Limitation Act has no application to a person in whose favour an order is made under s. 145, Cr. P. C. [p. 533, col. 2.]

Where, in proceedings under s. 145, Cr. P. C., the Magistrate found that the petitioner was dispossessed within two months before the date of the preliminary order and declared him to be in possession under the section, a suit by the petitioner for possession is not governed by Art. 47, Limitation Act, and is not barred if brought more than three years from the date of the order of the Magistrate. [*ibid*]

Wise v. *Ameerunnissa Khatoon* (2), *Yar Mohammad Saha* v. *Hayat Mohammad Saha* (3) and *Jogendra Kishore Chowdhry* v. *Brojendra Kishore Roy Chowdhry* (1), distinguished.

Second appeal against a decree of the District Court, East Tanjore, in A. S. No. 137 of 1923, presented against that of the Court of the District Munsif, Tiruvadi, in O. S. No. 418 of 1922.

M. *K. V. Krishnaswami Iyer*, for the Appellant.

Mr. *A. Venkatarayaliah*, for the Respondents.

JUDGMENT.—The plaintiff's suit is for possession of a house with mesne profits. The District Munsif decreed the plaintiff's suit but on appeal the District Judge dismissed the suit on the ground that it was barred by limitation under Art. 47 of the Limitation Act. The only point in this second appeal is whether Art. 47 applies to the plaintiff's suit. The plaintiff purchased the plaint house on 20th August, 1919. There was a possession case between the plaintiff and the defendants in 1919 and the Sub-Divisional First Class Magistrate at Tanjore passed an order on 19th August, 1919, in plaintiff's favour. The plaintiff presented his plaint on 21st December, 1922, that is more than three years after the date of the order of the First Class Magistrate. The learned District Judge held that the plaintiff's suit ought to have been brought within three years of the order of the Magistrate. The question is, is the plaintiff in whose favour an order under s. 145 of the Cr. P. C. has been passed, to bring a suit within three years for recovery for the possession of the property which was the subject-matter of the proceedings before the Magistrate. The order is in these terms:—

"I am satisfied that the petitioner was in possession of the house on 13th July, 1919, and that he has been forcibly and wrongfully dispossessed by the counter- petitioner. I, therefore, allow the petition and order the

counter-petitioners to pay the petitioner's costs."

The defendants-counter-petitioners before the Magistrate seem to have dispossessed the plaintiff, the petitioner before him, within two months of the preliminary order passed by the Magistrate and on the date of the final order the defendants were in actual possession of the property. On the strength of this it is contended for the respondent that the order was not in favour of the petitioner and, therefore, he should have brought a suit to set aside the order and to recover possession within three years. This argument overlooks the plain provision of the second clause of s. 145 (4) which is in these terms:—

"Provided that, if it appears to the Magistrate that any party has within two months next before the date of such order been forcibly and wrongfully dispossessed, he may treat the party so dispossessed as if he had been in possession at such date."

The possession, therefore, of the person who wrongfully dispossessed the person in possession of the property within two months before the date of the preliminary order is deemed to be the possession of the person so dispossessed. Form No. 22 puts the matter beyond all doubt for, the order that is drawn up is in these terms:—

"I do decide and declare that he is in possession of the suit property and entitled to retain such possession until ousted by due course of law and I do strictly forbid any disturbance of his possession in the meantime."

When the Magistrate declared the plaintiff to be in possession of the property, he was giving effect to the provisions of s. 145 already referred to. The physical possession of the property by the defendants was the possession of the plaintiff for the provision above referred to clearly lays down that the possession of the forcible dispossessor is deemed to be the possession of the person forcibly dispossessed, provided the forcible dispossession was within two months of the date of the preliminary order. Therefore, the order of the Magistrate must be considered to have confirmed the possession of the plaintiff and he did not give any possession to the defendants. Is a person in whose favour an order is made, bound to sue within three years of the order of the Magistrate in order to recover possession? I do not think he is bound to sue within three years for possession. Supposing the defendants had trespassed the day after or sometime after the Magistrate passed his order, could it be contended that the plaintiff in such a case was bound to bring a suit within three years of the date of the order. Article 47 applies to cases where a person is not given possession by the Magistrate under s. 145. There are cases where the Magistrate puts the property into the hands of the Receiver, not being able to determine which of the contending parties was in possession of the property on the date of the order; in such cases if a party wants to get possession of the property he should bring a suit within three years. But it is opposed to all principle to hold that a person in whose favour an order is made under s. 145, Cr. P. C., should bring a suit for recovery of possession within three years. The contention of Mr. Venkatarayaliah for the respondent is whether the order is for or against a person he must sue to recover possession within three years. The order of the Magistrate amounts to confirming the possession of the plaintiff and does not give possession to the defendants. Therefore when the Magistrate confirms the possession of a person, that person is not bound to bring a suit to recover possession. A number of cases have been cited by Mr. Venkatarayaliah but I do not think that any of them applies to the present case.

In *Jogendra Kishore Chowdhry* v. *Brojendra Kishore Roy Chowdhry* (1) it was held that a suit by a person bound under an order under s. 145 is governed by Art. 47 of the Limitation Act. It includes not only persons who are parties to the possession proceedings but also persons who claim from them or through them. *Wise* v. *Ameerunnissa Khatoon* (2) and *Yar Muhammad Saha* v. *Hayat Mohammad Saha* (3) do not help the respondent. A suit has, no doubt, to be brought if a person wants to recover possession from the Receiver who has been put in possession of the property by the Magistrate, otherwise the property would remain with the Receiver, in other words would be *in custodia legis*.

The case in 7 Indian Appeals 73 which is also reported in 6 Calcutta Law Reports 249 [*Wise* v. *Ameerunnissa Khatoon* (2)] does not materially help the appellant. In that case it was contended that after

(1) 23 C. 731; 12 Ind. Dec. (N. S.) 486.
(2) 6 C. L. R. 249; 7 I. A. 73; 3 Suth. P. C. J. 370; Bald. 350; 4 Sar. P. C. J. 127 (P. C.).
(3) 42 Ind. Cas. 763; 22 C. W. N. 342; 18 Cr. L. J. 1024.

three years a person in whose favour the order is made gets a title by prescription. Their Lordships of the Privy Council negatived such a contention. If two persons claim possession of some property and the Magistrate issues an order in favour of one and if that person is in possession of the property for more than three years, he cannot be said to acquire a title by prescription against the whole world. In *Solai Ammal* v. *Jogi Chetty* (4) it was held that after three years the unsuccessful party could not claim the property from the person who was the successful party before the Magistrate, for Art. 47 read with s. 28 of the same Act would give a title to the person in whose favour the order is made. As observed by the learned Judges "the principle underlying the article is that. as possession is outstanding, the party which is out of it should sue within three years to recover it. If he fails to sue within that period then under s. 28 the right to possession is extinguished." In this case as already observed the possession was with the plaintiff and not with the defendant as under the law the defendant's possession was the possession of the plaintiff.

Under the old Cr. P. C. there was no power specifically given to the Magistrate under s. 145 to restore possession to the person wrongfully dispossessed within two months of the passing of the preliminary order. Under the present Code a new clause has been inserted which empowers a Magistrate in such cases to give actual possession to the person forcibly dispossessed. In cl. (5) of s. 145 the relevant portion of the new clause is "May restore (meaning the Magistrate) possession to the party forcibly and wrongfully dispossessed." Before this amendment the Court could not very well restore possession to the person dispossessed unless the case was one which came under s. 522 of the Cr. P. C. which reads as follows:—

"Whenever a person is convicted of an offence attended by criminal force or show of force or by criminal intimidation, and it appears to the Court that by such force or show of force or criminal intimidation any person has been dispossessed of any immoveable property, the Court may, if it thinks fit, when convicting such person, or at at any time within one month from the date of the conviction, order the person dispossessed to be restored to the possession of the same."

Where no offence is committed which would come under s. 522 the Magistrate could not restore possession to the person dispossessed when acting under s. 145. But there is no ground for holding that the possession of the defendant was possession which the law recognised as his. In this view of the law the plaintiff's suit is within time. The second appeal is allowed, the judgment of the District Judge is set aside and that of the District Munsif restored with costs here and in the Court below.

V. N. V. *Appeal allowed.*

(4) 56 Ind. Cas. 675; 27 M. L. T. 53; 10 L. W. 637.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 798 OF 1924.

November 18, 1926.

Present:—Mr. Justice Iqbal Ahmad.

Pandit SHEO BALAK RAM AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MOHAN LAL AND ANOTHER—DEFENDANTS—RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 198—Suit for rent—Plea of bona fide *payment to another—Actual payment before suit, necessity of.*

In suits for arrears of rent the protection afforded by s. 198 of the Agra Tenancy Act is available to a defendant only in those cases in which the defendant pleads that the relation of landholder and tenant does not subsist between the plaintiff and himself on the ground that he has in good faith *paid* the rent claimed to some third person and is not available where the amount claimed has not been actually paid to any person. [p. 534, col. 2; p. 535, col. 1.]

Sheodihal Singh v. *Badri Narain* (1) and *Jeoni* v. *Kalloo* (2), followed.

Second appeal against a decree of the District Judge, Cawnpore, dated the 14th February, 1924.

Mr. *Haribans Sahai*, for the Appellants.

Mr. *U. S. Bajpai*, for the Respondents.

JUDGMENT.—This appeal must succeed. The point involved in this appeal is covered by two decisions of this Court reported as *Sheodihal Singh* v. *Badri Narain* (1) and *Jeoni* v. *Kalloo* (2). It has been held in those cases, that in suits for arrears of rent the protection afforded by s. 198 of the Tenancy Act is available to a defendant only in those cases in which the defendant pleads that the relation of land-

(1) 8 Ind. Cas. 1098; 7 A. L. J. 1198; 33 A. 61.
(2) 60 Ind. Cas. 837; 19 A. L. J. 298; 43 A. 448.

holder and tenant does not subsist between the plaintiff and himself on the ground that he has in good faith *paid* the rent claimed to some third person.

In the litigation, giving rise to the present appeal, it was common ground that the plaintiff was owner of half the *patti* in which the plots in respect of which the rent was claimed were situate, and as such the plaintiff was obviously entitled to the amount claimed by him, which was made up of half of the rent of the plots together with interest thereon. But the claim of the plaintiff was resisted by the contesting defendant on the ground that the relation of landholder and tenant did not subsist between the parties as the defendant had been in good faith paying the rent of the plots in dispute to Binda Charan who was the owner of the remaining half of the *patti*. Both the Courts below have accepted this defence and have dismissed the plaintiff's suit. It is abundantly clear from the written statement filed by the defendant that he had not, prior to the institution of the suit, paid the arrears claimed by Binda Charan, but the amount was, undoubtedly, due from him, and all that he alleged was that he *will* pay the same to Binda Charan. It having been admitted by the defendant that the amount claimed had not been paid by him to any person, s. 198 of the Tenancy Act had no application to the case, and both the Courts below were wrong in dismissing the plaintiff's suit.

Mr. Uma Shanker Bajpai has, with his usual ability, argued that in order to entitle a defendant to the protection afforded by s. 198 of the Tenancy Act all that is necessary is that he must in good faith have been paying the rent to some third person, and that it is immaterial whether or not the amount claimed in a suit for arrears of rent was actually paid by him to some third person before the institution of the suit. I am not prepared to say that the argument is without force, but the force, if any, must give way to the authority of the Division Bench rulings of this Court noted above.

It being an admitted fact that the plaintiff is owner of half of the *patti* in which the plots in possession of the defendant are situate, the plaintiff is a person to whom a portion of the rent with respect to the said plots is payable and the defendant is a person by whom the rent is payable and, therefore, the plaintiff is a "landholder" and the defendant a "tenant" within the meaning of those terms as defined by s. 4 (5) of the Tenancy Act and the relation of landholder and tenant does, undoubtedly, exist between the parties, and the rent claimed by the plaintiff not having been already paid by the defendant, the plaintiff was entitled to a decree.

For the reasons given above I allow the appeal and setting aside the decrees of the Courts below decree the plaintiff's suit with costs in all Courts.

A. N. A. *Appeal allowed.*

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL
No. 1595 OF 1926.
October 28, 1926.

Present:—Mr. Justice Addison.

DIWAN CHAND—JUDGMENT-DEBTOR—APPELLANT
versus
ANJAMAN IMDAD-I-KARZA, MISSION SCHOOL, DHARIWAL THROUGH SANT SINGH, PRESIDENT BANK AND *Mukhtar khas* FOR LIQUIDATOR ALLAH RAKHA—DECREE-HOLDERS AND F. J. MALL AND ANOTHER—JUDGMENT-DEBTORS—RESPONDENTS.

Co-operative Societies Act (II of 1912), s. 43—Rules under Act, r. 18 (h)—Award—Execution of award—Objection as to invalidity of award in execution.

An executing Court cannot go behind an award and entertain an objection to its validity in execution department.

Second appeal from an order of the District Judge, Gurdaspur, dated the 24th April, 1926, affirming that of the Sub-Judge, Second Class, Gurdaspur, dated the 11th March, 1926.

Mr. *Fakir Chand*, for the Appellant.

Messrs. *M. L. Puri* and *S. P. Puri*, for the Respondents.

JUDGMENT.—The Co-operative Credit Society of the Mission School, Dhariwal obtained an award for some Rs. 2,575 against one F. J. Mall and three sureties under the Co-operative Societies Act. The Society then applied for execution of this award as if it were a decree. Diwan Chand, one of the sureties, objected to its being executed against him on the ground that he had no notice of the arbitration and thus the award was void. Both the Courts

below have held that this objection cannot be raised in the execution proceedings and he has preferred this second appeal.

The lower Appellate Court held that the executing Court could not entertain the objection in execution proceedings. For this proposition there are numerous authorities of this Court. In Civil Appeal No. 695 of 1923 one of the objections was that the award in question was obtained without notice and was, therefore, invalid. It was held that such a contention could not be entertained by the executing Court which was bound under r. 18 (*h*) of the Rules framed under the Act to enforce the award as a decree and that the executing Court could not go behind the decree. A similar view was also taken in Civil Appeal No. 272 of 1926 where the objection again was that the award was a nullity and that the decree could, therefore, not be enforced.

I, therefore, dismiss this appeal with costs.

I might note that ground No. 1 (*c*) was not raised in any of the two Courts below. For this reason it cannot be taken here as it is not purely a question of law.

R. L. *Appeal dismissed.*

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 306 OF 1925.

August 20, 1926.

Present:—Mr. Justice Odgers and Mr. Justice Madhavan Nair.

S. K. VENKATARAMA IYER—APPELLANT

versus

A. BURAN SHERIFF AND ANOTHER—PETITIONERS NOS. 1 AND 2—RESPONDENTS.

Provincial Insolvency Act (V of 1920), ss. 9, 25—Creditor, right of, to present insolvency petition—Debt, existence of, necessity for, at date of petition or adjudication—"Some certain future date," meaning of—Appeal—Discretion to dismiss petition under s. 25—Appellate Court, powers of.

To enable a creditor to present an insolvency petition under s. 9 of the Provincial Insolvency Act, it is sufficient if the petitioner is a creditor at the time the petition is filed. It is not necessary that he must also be a creditor at the time the order of adjudication is passed. [p. 537, col. 1.]

The mere fact that a decree postpones the payment of the decretal amount till the disposal of an appeal filed in another suit does not disentitle the decree-holder from presenting and prosecuting a petition for the adjudication of the debtor as an insolvent. [p. 537, col. 2; p 538, col. 1.]

The provisions of s. 25 of the Provincial Insolvency Act are discretionary and the High Court will not exercise the discretion and reject an insolvency petition in appeal, when no such application was made to the Court of first instance. [p. 538, col. 1.]

Per *Odgers, J.*—The expression "some certain future time" in s. 9 (*b*) means any time in the future which is capable of being ascertained. [p. 537, col. 2.]

Appeal against an order of the District Court, South Arcot, in I P. No. 20 of 1923.

Mr. *M. S. Venkatarama Iyer*, for the Appellant.

Mr. *K. S. Venkatarama Iyer*, for the Respondents.

JUDGMENT.

Odgers, J.—This is an appeal against the order of the District Judge of South Arcot adjudicating the appellant an insolvent. The facts prior to this adjudication are a little complicated, and the arguments founded thereon have taken some time to hear. The petitioning creditors filed two suits against the debtor, O. S. No. 548 of 1922 for gunny bags and O. S. No. 583 of 1922 for some amounts due in a partnership business. There was, moreover, a suit O. S. No. 580 of 1922 by the insolvent against these creditors for accounts due on an alleged partnership between him and them. This suit on the 7th November, 1922, was dismissed and the other suits by the creditors were decreed. In May, 1923, the insolvent made some alienations of his properties and deposited the amount due in O. S. No. 548 into Court and the Court sale was set aside. On the 23rd May, 1923, a petition for adjudication was filed in the District Munsif's Court. In the meantime appeals had been filed in O. S No. 583 of 1922 and O. S. No. 580 of 1922. On the 13th August, 1923, creditors petitioned the District Court to adjudicate the appellant an insolvent, and on the 1st December, 1923, a stay of the petition was obtained pending the disposal of the appeals. On the 14th April, 1924, the appeal in O. S. No. 548 was allowed and the stay was dismissed. The appellant was, therefore, in a position to ask for restitution of about Rs. 585 which he paid out in order to set aside the Court sale. In O. S. No. 580, the appellant's suit, he obtained a preliminary decree for accounts and in O. S. No. 583 an amount of Rs. 1,059 was decreed against him (the appellant) but it was only to become payable on the passing of the final decree in O. S. No. 580 of 1922. This O. S. No. 580 has been to second appeal when it was decided against the appellant and is now awaiting final appeal under the Letters Patent. On the 17th September, 1924, the petition for ad-

judication was considered and the petitioners were held to be creditors and entitled to present the petition and two months afterwards the adjudication took place. The learned Judge has held that the petitioner has complied with tne conditions precedent set out in s. 9 of the Act to enable him to present the insolvency petition. It is admitted that the large bulk of the debt alleged to be due to the creditors is the amount due under the decree in O. S. No. 583 of 1922, *viz.*, Rs. 1,059 odd, the time for payment of which was postponed till the final decree was passed in O. S. No. 580 of 1922. The learned Judge held that the postponement had not the effect of divesting the petitioners' character as creditors and that they were creditors when the petition was filed and they are still creditors.

It is contended that it is not sufficient that these petitioners should be creditors at the time the petition was filed, but they must be creditors at the time the order of adjudication is passed. We do not find any provision to that effect in the Act although there is a note by Mr. Williams in his book that this obtains in the corresponding provision in the Bankruptcy Act. The question seems to me to be whether a creditor has fulfilled the three conditions precedent set out in para. 9 at the time he filed the insolvency petition, *viz.*, (to put it shortly) a debt of Rs. 500, a liquidated sum payable either immediately or at some certain future time, and an act of insolvency. With regard to the last requirement no question has arisen in this case. Certain acts of insolvency, namely, alienations of property have been *prima facie* found by the Judge to exist, and the adjudication is founded upon those, but as before stated, the objection before us is that the petitioning creditors were not clothed with the proper authority as required by the Act before filing the petition in the two other respects. We had a great deal of discussion as to whether this decree debt of Rs. 1,059 made payable on the passing of the final decree in O. S. No. 580 of 1922 is a liquidated sum payable at some certain future time and some decisions were quoted before us, *Rangasawmy Mudaliar* v. *Srinivasa Mudaliar*(1), *Juggomohun Ghose* v. *Manick Chand* (2) and *Page* v. *Newman* (3) to the effect that it must be some definite ascertained debt. Those decisions as pointed out by the learned Vakil for the respondents all relate to the Interest Act where the words are "certain time" and there has been some discussion as to whether "some certain future time" is something different from "a certain time." Speaking for myself I am rather inclined to think that the expression "some certain future time" means any time in the future which is capable of being ascertained. But I do not propose to decide in this present proceeding what the exact meaning of "some certain future time" in s. 9 (*b*) means. The question then comes down to this, whether the aggregate amount of debts due to the creditors amounted to Rs. 500 at the date of the filing of the petition. That that is the crucial date is, I think, fairly clear on principle because the words in s. 9 are that the creditors shall not be entitled to present an insolvency petition unless the three conditions set out are fulfilled and further we find that s. 13 (2) sets out the particulars that are to be contained in every insolvency petition presented by a creditor or creditors, and in (*b*) "the amount and particulars of his or their pecuniary claim or claims against such debtor." That seems to refer to the date of the insolvency petition. There is, no doubt, that at the date of the insolvency petition the appellant was indebted to the respondents in a sum of at least Rs. 1,059. But it is contended that the order made on appeal, namely, that this amount should not be payable until the amount of the final decree in O. S. No. 580 is ascertained has the effect of referring back the date of the appellate decree to that of the original decree and that, therefore, we do not know whether Rs. 1,059 or nothing or less or more will in fact be found due to the petitioning creditors. That argument, of course, cuts both ways, because it has to be remembered that O. S. No. 580 is under Letters Patent Appeal and if it is to be held that an appeal is simply a continuation of all the previous proceedings then O. S. No 580 is still going on. Then there is a further question as to the costs payable to the appellant. It was

(1) 8 Ind. Cas. 349; 8 M. L. T. 405; (1910) M. W. N. 731.

(2) 4 W. R. P. C. 8; 7 M. I. A. 263; 1 Suth. P. C. J. 357; 1 Sar. P. C. J. 681; 19 E. R. 308.

(3) (1829) 109 E. R. 140; 9 B. & C. 378; 4 Man. & Ry. 305; 7 L. J. K. B. (o. s.) 267; 33 R. R. 204.

stated to us that two sums of Rs. 204 and Rs. 245 were due to the insolvent from the creditors which together with a sum of Rs. 585 due to him (as stated above) in restitution would amount to something over Rs. 1,000. The question is whether a Court is to go into this kind of thing when it examines whether or not a petitioning creditor has qualified himself, to present his petition. I think not. I think that the fact that the appellant admittedly owed Rs. 1,059 at the date of the petition is sufficient to qualify the petitioning creditors. The only other point raised was that under s. 25 the Courts should have held that there were circumstances which rendered it improper to adjudicate this man an insolvent.

There seems to have been talk of a stay, hence this proviso in the decree as to the payment of Rs. 1,059 which has caused this trouble. But the provisions of s. 25 are discretionary and there is no evidence that the learned District Judge was asked to exercise this discretion under the section and I do not think it can be said that under those circumstances he ought to have exercised, nor am I prepared to do so on appeal. There may be good grounds why it is better in the interests of both parties that this man should be adjudicated an insolvent I do not know. But, it seems to me that to exercise a discretion under s. 25 in appeal and to hold that there is other sufficient cause why no order should be made would be to ask us to do a thing that we ought not to do especially in the circumstances of this case.

As to the costs one set has been paid into the Official Receiver's hands and the other set is under stay. It, therefore, cannot be said that this whole amount is due or can it be immediately set off against Rs. 1,059.

I think, therefore, this Civil Miscellaneous Appeal must fail and must be dismissed with costs.

Madhavan Nair, J.—I agree and have nothing to add.

V. N. V. *Appeal dismissed.*

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 242 OF 1926.

November 10, 1926.

Present:—Mr. Justice Jai Lal.

SAWAN SINGH—PLAINTIFF—PETITIONER

versus

SURAIN SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

C. P. C. (Act V of 1908), O. VII, r. 18, O. VI, r. 18—Failure to amend plaint within time—Fresh suit on same cause of action, maintainability of.

The rejection of a plaint for failure to amend the same within the time fixed by the Court does not bar the institution of a fresh suit on the same cause of action.

Petition for revision of a decree of the Sub-Judge, Fourth Class, exercising the powers of a Judge, Small Cause Court, Gurdaspur, dated the 7th November, 1925.

Mr. *J. N. Bhandari*, for the Petitioner.

Mr. *G. S. Salarya*, for the Respondents.

JUDGMENT.—The plaint in the previous suit brought by the plaintiff on the same cause of action was rejected on the ground that it was not amended within the time fixed by the Court. It appears that objection was taken to it on the score of multifariousness and, therefore, the plaint was returned for amendment. The plaintiff then instituted the suit out of which these proceedings have arisen on the same cause of action. This suit has been dismissed by the lower Court on the ground that a fresh suit does not lie under O. VI, r. 18, C. P. C. I do not think that this rule prohibits a fresh suit being brought on the same cause of action when the plaint has not been amended within the time fixed by the Court or the law. All that that Order prohibits is an amendment of the plaint after the expiry of the time. The law applicable to the present case is O. VII, r. 13 which provides that if a plaint is rejected for any ground mentioned in the previous rules the plaintiff shall not be precluded from presenting a fresh plaint in respect of the same cause of action merely on account of such rejection. Order VII, r. 11 (*d*) authorises the rejection of a plaint where the suit appears from the statement in the plaint to be barred by any law. The suit which is bad for multifariousness fails under this clause and, therefore, the plaint was rejected under O. VII, r. 11, C. P. C.

In my opinion, the reasons given by the Judge, Small Cause Court, for dismissal of the suit are not sound and I accept this petition, set aside the decree of the lower

Court and remand the case to him for disposal of the suit in accordance with law. The petitioner will have his costs in this Court.

A. N. A. *Petition accepted.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1610 OF 1923.

August 4, 1926.

Present :—Mr. Justice Ramesam.

KANYADHARA THATHAYYA—
DEFENDANT No. 2—APPELLANT

versus

KANYADHARA RAGHAYAYYA *alias* KRISHNIAH AND ANOTHER—PLAINTIFFS AND DEFENDANT No. 1—RESPONDENTS.

Hindu Law—Joint family—Father, whether effectively represents son in suits—Question whether sons were sufficiently represented, whether one of fact—Second appeal.

The question how far Hindu sons are bound by a decree against the father must be decided with reference to the particular facts of the case; if the father is the manager and the question in issue is one which equally affects him and the other members of the family and if the suit is properly defended, the adjudication will bind all the persons interested along with the father for the reason that in that case it must be presumed that the father represents the interests of all. [p. 540, col. 2.]

Jogendro Deb Roy Kut v. *Funindro Deb Roy Kut* (2), followed.

The question whether on certain facts admitted or found, a Hindu son was properly represented by his father is not one of fact but one of law. [p. 541, col. 1.]

On a dispute arising between two rival adopted sons of a Hindu father, one of them brought a suit for partition against the father. The father set up the rights of the other adopted son, the matter was referred to arbitration and the plaintiff got a decree for ⅓rd share. The other adopted son was aware of the litigation and actually conducted it:

Held, that the latter adopted son was bound by the decree in the suit inasmuch as the father must be deemed to have effectively represented him. [p. 540, col. 2.]

Second appeal against a decree of the District Court, Guntur, in A. S. No. 286 of 1922, presented against that of the Court of the District Munsif, Tenali, in O. S. No. 312 of 1921.

Mr. *G. Lakshmana*, for the Appellant.

Mr. *Ch. Raghava Rao*, for the Respondents.

JUDGMENT.—This second appeal arises out of a dispute between two rival adopted sons. The 1st defendent K. Ramayya had and has no children. It is the case of the 2nd defendant Tatayya who is the wife's sister's son of Ramayya that he was adopted in 1911 or 1912 by Ramayya. It is also now found that Ramayya adopted his brother's son Ragavayya the plaintiff in the present suit, in November, 1919. It is obvious that, if the 2nd defendant was adopted in 1911 or 1912 the reason for the second adoption in 1919 was that for some reason the 1st defendant wanted to throw the first adoption overboard and create a rival adopted son. It is said his wife's relations, set up the adoption of the plaintiff in 1919, the 2nd defendant filed a suit on the 25th October, 1920, against Ramayya to establish his adoption and to recover his share of the property. The plaint in that suit is now filed as Ex. F. The object of the suit was primarily the establishing of 2nd defendant's adoption. The relief for partition was a merely incidental and consequential one. The father Ramayya filed a written statement in which he denied Tattayya's adoption, set up by the adoption of Raghavayya, his brother's son and prayed that the suit might be dismissed with costs. The whole of the family properties was the subject of that suit. In so defending Ramayya was attempting to safeguard not only his own interests but those of Raghavayya whom he put forward as his properly adopted son. One might go further and say that in asking that the suit to be dismissed with costs, he was really fighting the battle of the really adopted son according to him rather than his own. The one issue that was framed in the case was "is the plaintiff's adoption true," the plaintiff there being Tattayya. If Tattayya's adoption is true, Raghavayya's adoption in 1919 is void and useless; but Raghavayya's adoption will stand if Tatayya's was false; so that that issue really raised the question which of the two rival adoptions ought to stand. Both parties applied by Ex. III to refer that suit to three arbitrators who were all Vakils. The arbitrators passed their award, Ex. IV, dated 10th September, 1921, in which they found that the adoption of Tattayya was true, but that making this adoption, the father expected Tattayya to come and live with him and to marry his sister's daughter and to help the father in the cultivation of the land. They found the adopted boy has failed to fulfil these expectations of the father. He married another girl and did not reside with the adopted father. On these grounds they gave an award for only ⅓rd of the suit pro-

perty and some costs. The award was made a decree of Court. The present suit is filed on 3rd December, 1921, that is, within three months after the award; and whatever the truth may be, one thing is very obvious *viz.*, that the suit is instigated by the father as the result of his defeat in the former suit and is an attempt to get over the effect of that award. In the present suit both the lower Courts have found that Tattayya's adoption was not probable so that we have got the result before us; as the result of one litigation between the 1st defendant and Tattayya it was found that Tattayya was the adopted son of Ramayya and as the result of another litigation, the present one, it is found that Tattayya was not the adopted son of Ramayya and both these results are obtained by decrees of Courts. Obviously there is something anomalous in this state of things. It seems to me that the first point that arises in the present litigation for decision by the Courts is, how far does the decree in the former suit bind the plaintiff? If this point is decided against the plaintiff, the question of fact as to whether Tattayya was validly adopted does not arise. The object of the rule of *res judicata* is to prevent such enquiries. The Munsif discussed this in para. 16 of his judgment and found that the present plaintiff was not bound by the result of the former suit. Incidentally he observes :—"It is, no doubt, true as deposed by 1st defendant himself that plaintiff knew of O. S. No. 136 of 1920 and appeared to have been going to Baptla in connection with it and also instructed the 1st defendant's Pleader in it." This finding of the District Munsif is completely supported by the deposition of the 1st defendant as P. W. No. 10 which runs as follows :—

"In the suit in the Baptla Court also the plaintiff financed. In that Court my Pleader was Mr. D. Hanumantha Rao, plaintiff engaged him. Plaintiff was attending that Court at every hearing of the suit. Plaintiff and my witnesses stayed there. After the petition for arbitration was filed I did not again go to my Baptla Pleader, I did not remember what the *panchayatdars* decided. I did not go to Baptla to my Pleader after the *panchayatdars* gave their award. Plaintiff himself was going to my Pleader."

It is obvious that the present plaintiff conducted that suit much more vigorously than his father. In my opinion the true principle to apply in cases of this kind was enunciated so early as *Kunjan Chetti* v. *Sidda Pillai* (1). Their Lordships Subramania Iyer and Benson, JJ., say:—

"It is not clear what the District Judge means by stating that the sons were not effectively represented."

The question how far the sons are bound by a decree against the father in cases like the present must be decided with reference to the particular facts of the case; if the father is manager and the question in issue is one which equally affects him and the other members of the family and if the suit is properly defended the adjudication will bind all the persons interested along with the father for the reason that in that case it must be presumed that the father represents the interests of all [*Jogendra Deb Roy Kut* v. *Funindra Deb Roy Kut* (2).] If the sons are of full age and are aware of their litigation and take no steps to be brought on the record but acquiesce in the conduct of the litigation by the father, the case will be still stronger and they will be clearly bound by the decision.

The present case is still stronger because not only, in this case is the son of full age and aware of the litigation and takes no steps to be brought on the record and acquiesces in the litigation, but actually conducts the litigation of the father. Mr. Raghava Rao appearing for the respondents contended that the former judgment must be regarded as having been wholly set aside not only as against the plaintiff but also as between the 1st and 2nd defendants and for this position he relies on a decision in *Venkata Rao* v. *Tuljaram Roy* (3). In my opinion that case has nothing to do with the facts of this case. In that case a father and son, a minor, were both parties to the first litigation. The father purported to compromise it and a compromise decree was passed. By the compromise decree he relinquished the claim under certain decrees. Later on, the son

(1) 22 M. 461; 8 Ind. Dec. (N. S.) 330.

(2) 14 M. I. A. 367 at p. 376; 17 W. R. 104; 11 B. L. R. 244; 2 Suth. P. C. J. 517; 3 Sar. P. C. J. 32; 20 E. R. 824.

(3) 74 Ind. Cas. 765; 45 M. 298; 20 A. L. J. 833; 26 C. W. N. 646; 30 M. L. T. 272; 4 U. P. L. R. (P. C.) 33; A. I. R. 1922 P. C. 69; (1922) M. W. N. 392; 43 M. L. J. 298; 24 Bom. L. R. 1191; 36 C. L. J. 319; 49 I. A. 91 (P. C.).

after attaining majority filed a suit for a declaration that the compromise of the father was not binding on him and when the case went to the Privy Council he succeeded, *i.e.*, the compromise was set aside and the Privy Council held in the later case that the effect of the earlier decision setting aside the compromise was that the compromise was inoperative as to the whole family, and not merely as to the minor. I do not think we have got anything like similar facts in this case. The question whether son was effectively represented in the former suit is really a question of law provided all the facts are known. Mr. Raghava Rao suggested I should call for a finding from the District Judge on the facts. But it seems to me all the facts are either admitted, conceded or found and, therefore, the only thing that remains is to draw a legal inference whether on the facts the son must be regarded as properly represented in the former suit. I am of opinion that the decree in O. S. No. 136 of 1920 is binding on the present plaintiff as well as on the 1st defendant. Therefore, the suit should be dismissed with costs against the 2nd defendant and the finding as to the validity of plaintiff's adoption is set at large as havng been unnecessarily gone into by the Court below. But this does not mean that the whole suit should be dismissed. In the Courts below the plaintiff obtained a decree for half of the property. The 1st defendant has not appealed against that decree. He has been supporting the plaintiff throughout. He appears before me by the same Vakil as the plaintiff. He does not urge that the plaintiff's suit should be dismissed as against him; and, if he does not urge it, I do not see why the whole of the plaintiff's suit should be dismissed. The decree, therefore, that plaintiff should get half the property will stand but this will be only against the 1st defendant. As it is admitted before me by all parties that the property has never been divided by metes and bounds, the plaintiff's decree for half the property will not affect the 2nd defendant's right to a third under the award and can operate only to the diminution of the remaining two-thirds held by the 1st defendant under the award. The result of this modification of the lower Court's decree is that the plaintiff gets half the suit property, 1st defendant gets one-sixth and the 2nd defendant gets one-third. I may also add that, even if my view that the former decree is binding on the plaintiff is not correct and the proper view to take is that the former decree continues to be binding as between 1st and 2nd defendants while not binding on the plaintiff the decree to be passed will be exactly the same which has been arrived at otherwise, namely, that the plaintiff should get a decree for half out of the 1st defendant's two-thirds leaving the 2nd defendant's one-third unaffected. Either way the same result is arrived at. So long as the plaintiff gets a decree for half the suit property which is all that he has sued for, I do not think it lies in his mouth to say that the half which he gets should not be to the detriment of the 1st defendant but should somehow be detrimental to the 2nd defendant. He has got a decree for what he has asked for and he can have nothing to complain. Similarly the 2nd defendant cannot complain and say that the plaintiff should get no decree, the one-third he got by the former decree is sufficient and he is not concerned any more with what became of the other two-thirds. The only man aggrieved by the form of the decree I am giving is the 1st defendant. Instead of having two-thirds or half in his hand which would have been the case if he had only one adopted son, he would have got only a sixth; but for this result he had to thank himself. First he submitted to an arbitration relating to the first adoption and became bound by the award and decree; meanwhile he makes a second adoption to get rid of the first and submits to a second decree for half of the property. The result of the two decrees each of which is binding and to each of which he is a party is that he loses in each case; and I do not see any reason why he should complain. The decrees of the Courts below will be modified as indicated above.

As the appellant has succeeded in second appeal plaintiff will pay the costs of the 2nd defendant throughout to be estimated on his one-third.

V. N. V. *Appeal allowed.*

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 1780 OF 1922.
November 10, 1926.
Present:—Mr. Justice Broadway and
Mr. Justice Zafar Ali.
Musammat LACHMI—DEFENDANT—APPELLANT
versus
THE FIRM GOPICHAND-ARURCHAND THROUGH ARURCHAND—PLAINTIFFS—RESPONDENTS.

Interest—High rate of interest—Suit against legal representative—Legal representative not aware of claim—Court's power to reduce interest.

A suit was instituted against the legal representative of a deceased debtor for Rs. 6,222 out of which Rs. 1,500 was the principal and the balance interest which had accrued due at the rate of 25 per cent. per annum with annual rests. The creditor did not make any demand on the legal representative for the debt and the latter alleged that he had no notice of the debt at all. The trial Court awarded an amount equal to the principal towards interest and refused to decree the balance. On appeal:

Held, that the Court had under the circumstances the power to reduce the interest claimed and did not act either illegally or inequitably in giving a decree for interest equal to the amount of the principal.

First appeal from a decree of the Senior Sub-Judge, Lahore, dated the 6th May, 1922.

JUDGMENT.

Broadway, J.—This and the cross-appeal No. 2093 of 1922 arise out of a suit brought by the firm of Gopichand-Arurchand against *Musammat* Lachmi for a sum of Rs. 6,222. The debt has been incurred by the son of *Musammat* Lachmi, one Bahal Singh in 1915. Bahal Singh was murdered a year or so after that and the present suit was lodged within the period of the limitation but without any notice, in writing at any rate, being served on *Musammat* Lachmi. The claim was based on a bond for Rs. 1,500 bearing interest at the rate of 25 per cent. per annum with annual rests and a *bahi* account of Rs. 200. *Musammat* Lachmi denied all knowledge of the indebtedness of her son and pleaded definitely that she had not been notified of the claim. The trial Court granted the plaintiffs a decree for Rs. 1,700 as the principal and a further sum of Rs. 1,700 as interest with costs in proportion. This result has dissatisfied both sides. *Musammat* Lachmi in her appeal claims that she ought not to be made to pay interest at all, whereas the firm of Gopichand-Arurchand claim that they should be allowed interest in full and ask for an increase of the decretal sum by Rs. 2,822.

It has been urged by Mr. Mehr Chand on the authority of a large number of rulings that the mere fact that there has been a delay in bringing a suit, or that the rate of interest appears to be large is not sufficient to warrant a Court to interfere in favour of the debtor on the question of interest unless undue influence has been established or the rate of interest could be held to be penal. With these decisions we have no quarrel. They are, however, all differentiated from the suit before us in that here it is sought to recover the money from the mother of the original debtor. The mother clearly stated that she had no knowledge of the debt and that no demand has been made from her. Arurchand is the plaintiff and had to admit that he had not given *Musammat* Lachmi any notice in writing, nor does he say that he made any oral demand. In these circumstances, in my judgment, the Court below has not acted either illegally or inequitably in giving the plaintiff a decree for interest equal to the amount of the original sum, which I might mention is partly composed of interest as is evident from the accounts brought on the record. In my judgment the decision arrived at by the Court below is correct and I would, therefore, dismiss both appeals with costs.

Zafar Ali, J.—I agree.

A. N. A. *Appeal dismissed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1755 OF 1922.
September 16, 1926.
Present:—Mr. Justice Odgers and
Mr. Justice Madhavan Nair.
K. SENGA NAICKEN AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
THE SECRETARY OF STATE FOR INDIA IN COUNCIL REPRESENTED BY THE DISTRICT COLLECTOR OF SALEM—DEFENDANT—RESPONDENT.

Land Acquisition Act (I of 1894), s. 6 (1)—Public purpose—Declaration—Acquisition for private persons—Payment by Government of trifling sum 'towards compensation'—Acquisition, validity of—Public funds, meaning of.

The requirement of the proviso to s. 6 (1), Land Acquisition Act, that the compensation is to be paid partly out of public revenue is complied with if some

part of the compensation, however small it may be, is paid out of the public funds. It need not be a substantial part of it. [p. 545, col. 2.]

A declaration under s. 6 of the Land Acquisition Act is, therefore, valid even if the Government contributes towards the payment of compensation only one anna out of the public revenue out of a total sum of Rs. 600, the remainder being paid by private contributions. [*ibid.*]

Ponnaia v. *Secretary of State* (1), dissented from.

Chatterton v. *Cave* (2) and *Luchmeswar Singh* v. *Chairman, Darbanga Municipality* (3), distinguished.

Per *Odgers, J.*—Private contributions which are kept by the Government as a separate deposit for a particular purpose cannot be said to be public funds inasmuch as they do not merge in the general funds of the public. [p. 543, col. 2.]

Second appeal against a decree of the District Court, Salem in A. S. No. 135 of 1921, preferred against that of the Court of the Principal District Munsif, Salem, in O. S. No. 2 of 1920.

The case coming on for hearing before Odgers, J., and Viswanatha Sastri, J., their Lordships passed the following

ORDER.—A similar question was under discussion in *Ponnaia* v. *Secretary of State* (1) before Spencer and Ramesam, JJ., and we feel that it is inexpedient that the question should be decided before us before we have had an opportunity of seeing the judgment which will shortly be delivered by the other Bench. We feel that it is also important to find out exactly how this sum of Rs. 926-7-6 was deposited by the *ryots* in this case—was it deposited for the specific purpose of constructing this road and was it accepted as such or was there simply a credit to the general revenues of the amount? The form of the receipt granted to the *ryots* may be material and the way in which the money has been credited in the books of the Government Officers. There will be a finding called for on the nature and terms of the deposit made by the *ryots* in this case and the District Judge will also deal with any evidence either already on record or additional as the parties may produce on this point. The finding will be submitted within six weeks and ten days will be allowed for filing objections.

In pursuance of the order of this Court dated the 6th September, 1925, calling for a finding upon the issue referred to by this Court for trial, the District Judge of Salem submitted the following

FINDING.—....."The contributions made by the *ryots* were accepted as such by the Government and kept as separate deposit for the purpose of constructing the road."

The Advocate-General and Mr. *K. Ramanath Shenai*, for the Appellant.

The Government Pleader, for the Respondent.

JUDGMENT.

Odgers, J.—This was a suit by two inhabitants of Thidavoor, Athur Taluk, Salem District, against the Secretary of State, for a declaration that certain notifications and subsequent proceedings taken by the Government Officials under the Land Acquisition Act are illegal and *ultra vires*. The plaintiffs are the owners of the property in question which was acquired for the purpose of forming a road by a Government notification, dated 14th September, 1918. The learned District Munsif dismissed the suit. On appeal to the learned Judge the same result was reached. It appears that the cost of the road was defrayed by private contributions and that Government added the sum of one anna from public revenue. When the second appeal first came on before Mr. Justice Viswanatha Sastri and myself, we found that a similar discussion as to whether the provisions of s. 6, cl. (1) had been complied with was under discussion in *Ponnaia* v. *Secretary of State* (1), before Spencer and Ramesam, JJ. We, therefore, deferred our decision on the question but sent the case down for a finding as to how the contributions were deposited by the *ryots* in order that we might discover whether that money could be fairly termed public revenue or not. The learned District Judge, now Mr. Justice Wallace, in the lower Appellate Court held that the compensation awarded was at the time of the award "public revenue" and that as soon as the public agency has applied the private funds for public purposes private ownership in these funds ceases and they become public revenue. The finding called for has now returned and it is to the effect that the contributions were accepted as such by the Government and kept as separate deposit for the purpose of constructing the road. It, therefore, seems to me that the contributions cannot be said to be public funds as they were never merged in the general funds of the public.

However, that does not decide the matter. It is admitted that the Government contributed one anna to the cost and the question is whether this satisfies the requirement

(1) 97 Ind. Cas. 471; 51 M. L. J. 338; 24 L. W. 513; A. I. R. 1926 Mad. 1099.